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REPORT OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH.

BY

CHRISTOPHER ROBINSON, ESQ.

BARRISTER AT LAW AND REPORTER TO THE COURT.

VOL. XVII.

CONTAINING THE CASES DETERMINED
FROM TRINITY TERM 22 VICTORIA, TO HILARY TERM 22 VICTORIA :
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

TORONTO :

R. CARSWELL.

1878.

BENGOUGH BROS., PRINTERS. IMPERIAL BUILDINGS, TORONTO

JUDGES
OF
THE COURT OF QUEEN'S BENCH,
DURING THE PERIOD OF THESE REPORTS :

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.
" ARCHIBALD MCLEAN, J.
" ROBERT EASTON BURNS, J.

Attorney-General :
HON. JOHN A. MACDONALD.

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REPORT OF CASES
IN
THE COURT OF QUEEN'S BENCH

TRINITY TERM, 22 VICTORIA, 1858, (*Continued*).

Present:

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.
" ARCHIBALD MCLEAN, J.
" ROBERT EASTON BURNS, J.

CANN V. THOMAS.

Absconding debtor—Attachment—Execution—C. L. P. A., secs. 53, 55.

The plaintiff obtained execution against A. whose goods were then under seizure upon an attachment issued against him as an absconding debtor.

The sheriff, under C. L. P. A., sec. 53, having sued and obtained payment of a sum due by one of A.'s debtors.

Held, that such money was not liable to the plaintiff's execution, but must be divided among the attaching creditors.

This was an action brought by the plaintiff against the defendant, as sheriff of the county of Wentworth, on a return of *nulla bona* made to a writ of *fiery facias* placed in his hands on the 2nd day of November last past, against the goods and chattels of one William Dodds, in favour of the said plaintiff; and by consent of parties, and by the order of a judge, the following case was stated for the opinion of the court without pleadings:—

On the 10th of October, 1857, the above named plaintiff obtained a judgment in this honourable court against one William Dodds, and on the second day of November following placed a writ of *fiery facias*, against the goods and chattels of said Dodds, in the hands of the defendant, as sheriff, for the execution thereof.

On or about the eleventh day of October last past the said William Dodds absconded from this province, and proceedings were then taken against him as an absconding or concealed debtor, and on the twelfth day of the same month a writ of attachment against the said William Dodds, as such absconding or concealed debtor, was placed in the hands of the defendant, as such sheriff as aforesaid, at the suit of John Riddell and John MacNab, who in due course obtained judgment, and placed a writ of *feri facias* thereon, against the goods and chattels of the said William Dodds, in the hands of the said defendant, to be executed according to the exigency thereof.

Various other writs of attachment, including one at the suit of one Young against Dodds issued on the thirteenth day of such last mentioned month of October, were sued out against the said William Dodds at or about the time of the issuing of the last mentioned writ of attachment, and were also duly prosecuted to judgment and execution.

On or about the thirteenth day of the same month of October, and before the writ of *feri facias* of the said plaintiff, so by him obtained under his judgment, was issued and placed in the hands of the said defendant, he, the said defendant, as such sheriff as aforesaid, did give notice in writing to the Great Western Railway Company, a debtor of the said absconding debtor, as provided by the 52nd section of the Common Law Procedure act, and the personal and other property of such absconding debtor having proved insufficient to satisfy the said attachments and the executions issued thereon, did, in pursuance of the provisions of the said act, sue for and recover from the Great Western Railway Company the sum of £341 13s. 3d., and the said money now remains in the hands of the said defendant as such sheriff as aforesaid, and was in the possession and custody of the said defendant before and at the time of the return of the writ of *feri facias* in favour of the plaintiff hereinbefore mentioned.

The said sum is not sufficient to satisfy said attachments.

The question for the opinion of the court is, whether the money so received by the sheriff from the Great Western Railway Company is liable to be seized and taken by the sheriff in satisfaction of the *feri facias* so issued and placed in his hands by the plaintiff, or whether the same is liable to the several attachments so issued against the absconding debtor.

If the court should be of opinion that the money was or

is so liable to seizure under the *fi. fa.*, judgment shall be entered for the plaintiff, if otherwise for defendant.

Start, for the plaintiff. *Burton*, contra.

C. L. P. A., 1856, secs. 53, 55, 57, 58, 194; *Collingridge v. Paxton*, 11 C. B. 683, were referred to.

ROBINSON, C. J.—I think the money obtained by suing the Great Western Railway Company under the 53rd clause of the acts must be divided among the plaintiffs in the writ of attachment, and cannot be treated as if it was the proceeds of goods remaining in the hands of the absconding debtor, and so paid over to the judgment creditor, who obtained judgment before the debtor absconded; and cannot therefore be paid over to such judgment creditor, under the 55th clause of the Common Law Procedure Act.

The legislature never could have intended that when an attachment creditor had availed himself of this provision of the statute, giving the security for costs which the act requires, a creditor who had obtained execution upon a judgment against the debtor before he absconded, should step in and sweep away the fruits of the action brought by the sheriff at the instance of the attachment creditor for his benefit.

If the debtor had never absconded, and this were a question between a previous execution creditor and a subsequent one, which should receive the benefit of a garnishee order obtained by the plaintiff in the second writ, there could be no question that when the money was collected by the creditor who obtained the order, he would hold it against the creditor who had the prior execution.

The case cited from 11 C. B. 683, has a material bearing on this case.

We are clear that the plaintiff cannot sustain this action.

BURNS, J.—I think judgment should be given for the defendant. It is admitted that the debt due from the Great Western Railway Company to the judgment debtor was merely an account, and therefore not liable to seizure by

virtue of the 22nd section of 20 Vic., ch. 57, similar to the English act 1 & 2 Vic., ch. 110, sec. 12, enabling sheriffs to seize upon writs of *fi. fa.*, money, bank notes, cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or securities for money. It is said the plaintiff might have had the remedy by garnishment under the 194th section of the Common Law Procedure Act, after he had obtained his judgment, had it not been for the attachments sued out and notices given under the 52nd section of the act, which would deprive him of that remedy. All we can say to that question is, if it be any hardship upon one creditor more than upon another, which of them is to obtain the fruit of his legal proceedings first, the legislature must apply the remedy. The 55th section preserves to the creditor who sues before the debtor has absconded his legal rights upon his execution to the exclusion of the attaching creditor, and the remedy by garnishment of the demands due to the debtor is an addition, for he never had it before. It may be the legislature considered it would be justice to allow the creditor who should obtain execution upon a suit commenced before the debtor absconded, to have all goods and effects liable to execution held to satisfy the execution prior to the claim of the attaching creditor, and that the attaching creditor might have all other demands not liable to execution held liable to his claim by reason of the attachment and notice to the debtors of the judgment debtor in priority to the execution, but that is not a point for the court to speculate upon. The question here is whether the money, the proceeds of the demands against the Great Western Railway Company, is to be considered as liable to the execution when that money came into the sheriff's hands, though it be admitted, so long as it remained a debt due by the Railway Company, the execution could not touch it. In the case of *Collingridge v. Paxton* (11 C. B. 683), the court held that bank notes seized by the sheriff could not be treated as liable to seizure on another execution then in his hands against the plaintiff at the suit of another person. Now in this case I apprehend, for the same reason given in

that case, the amount of the debt due by the Railway Company, when paid into the hands of the sheriff, could not be said to be money identical in the hands of the sheriff of the judgment debtor. The judgment debtor, or his attaching creditors, would have no claim to the identical bank notes, or gold, or silver, or cheque, or whatever the Great Western Railway Company might have paid the sheriff with. It is in that sense, I think, the legislature meant it, when authority was given to the sheriff to seize money, &c., belonging to the debtor. In this case it appears the sheriff recovered the amount from the Railway Company under the provisions of the 53rd section, and that section says the sheriff shall hold the money recovered by him as part of the assets of such absconding debtor, and shall apply them accordingly. The 57th section shews how it shall be distributed.

The goods and effects of the absconding debtor in the hands of the sheriff would be liable to such executions as he might have under the provisions of the 55th section, but I do not think that demands which the execution could not touch can be treated, when the sheriff has obtained payment of them, in the same way. The effect of the several clauses of the act is to constitute the sheriff a trustee for the attaching creditors, and it is in virtue of that capacity cast upon him by the act, that the money due from the debtors of the judgment debtor comes into his hands, and not by virtue of his office of sheriff. The former act provided for the attaching creditor plaintiff collecting the demands from the debtors, and using them if not paid, and by that means discharging his own demand. If that provision had remained in force, it never could be contended that, as soon as the attaching creditor had obtained payment, the sheriff could take the money out of his hands upon an execution against the debtor in the situation this plaintiff's execution is. It does not appear to me that the effect of substituting the sheriff as the proper person to collect those demands has the effect of altering the law, and saying that when the money has been paid to the sheriff under one authority, it shall be considered the debtor's money so *ear-marked* as that

it instantly becomes liable to another species of demand, which could never have touched it but for the circumstance of the legislature constituting the sheriff a trustee to sue for debts, instead of allowing every creditor to sue for himself, and in some cases, perhaps, sue for a part only, that is, so much as would be sufficient to satisfy a particular demand.

MCLEAN, J., concurred.

Judgment for defendant.

MCDONELL V. BOULTON.

Lease—Condition for renewal—Construction of—Arbitration—Submission by cestui que trust—Not binding on trustee.

Plaintiff leased to one M. certain premises for twenty-one years, and it was stipulated by the lease that at the expiration of the term the lessee might retain possession, on condition that within three months a new rent should be ascertained by arbitration; but that if the lessor should desire to resume possession he might do so, on paying the value of the improvements, to be ascertained as therein provided for; and this arrangement was to be made at the end of each term. It was then provided, that if "at the expiration of the next or any subsequent term of twenty-one years, no new ground rent should be ascertained as aforesaid;" or if the lessor should not resume possession, then the lessee should continue, "upon payment of the rent last ascertained to be payable." This lease was assigned by M. to defendant, as trustee for one F. At the expiration of the first term of twenty-one years no notice was given, nor new rent fixed; but after the three months had gone by arbitration bonds were entered into by F. and the plaintiff. Defendant appeared and acted for F. at the arbitration, and the arbitrators directed a renewal lease at a sum more than five times the first rent, or that the lessor should pay a certain sum for the improvements. The lessor elected to renew, and notified the lessee, who refused to accept at the new rent, and he then brought ejectment.

- Held*, 1. That the plaintiff could not recover, for whether the arbitration was binding upon defendant or not, as to the amount of rent, he was entitled to a new term by the conditions of the lease, and there had been no forfeiture.
2. That defendant was not bound by the award, the submission being only by his *cestui que trust*.
3. Upon the construction of the lease—that the provision last mentioned applied at the end of the *first* term of twenty-one years, as well as of subsequent terms, and that defendant was therefore entitled to retain possession for another term, at the original rent.

CASE.

This was an action of ejectment brought by the plaintiffs for the recovery of the possession of part of lot letter A., situate on the south side of King street, between Yonge and Church streets, in the city of Toronto, being about twenty-

one foot in front on King street, by fifty feet in depth ; and more particularly described in the writ. By the consent of parties, and under the order of the Honourable Mr. Justice *Richards* at *nisi prius*, during the spring assizes of this year, a case was stated for the opinion of the court, which was in substance as follows :

Subjoined is a copy of the material parts of the lease made by the plaintiff to one George Munro, and of the assignment thereof to the defendant by a deed-poll endorsed on the said copy of lease.

The defendant took the said assignment as a trustee under the marriage settlement of James Forlong, and a lease of the premises in question, which is also subjoined, was executed by the Honourable John Hillyard Cameron, acting as the agent of the said James Forlong, but without any written power of attorney, or special authority from the said James Furlong or the defendant ; and the said Hillyard Cameron, as such agent as aforesaid, received the rents and profits hitherto, and paid the same to the said James Furlong, and the premises are actually occupied by a tenant holding under a lease so made. No notice having been given by either party under the said annexed lease and assignment, nor any new ground rent having been fixed after the expiration of the term of twenty-one years, an action of ejectment was brought in the Court of Common Pleas, on the 2nd day of June, 1857, by the plaintiff against the said James Forlong, to recover possession of the premises mentioned in the said lease, and before the judgment had been given therein, the parties thereto executed bonds, one part whereof is hereto annexed.

The arbitrators named in the said bonds entered upon and proceeded with the reference, which was conducted on the part of the said James Forlong wholly by the said defendant, who is also a subscribing witness to the bond executed by the said James Forlong, and who delivered the same so executed, on behalf of the said James Forlong, to Adam Wilson, as attorney for the plaintiff.

The arbitrators not having made their award on the 1st day of January, the day limited therefor, met on the 4th day of the same month, and then, by endorsement on one of the submission bonds, enlarged the time for making the award until the 1st day of February, 1858.

The plaintiff and defendant were both aware of the said enlargement, and of the time when it was made, and both appeared before the arbitrators in the matter of the reference after the enlargement.

The arbitrators, on the 22nd day of January, A.D. 1858, made their award, a copy of which is hereunto annexed.

The plaintiff elected to grant a renewal at the rent awarded, and on the 27th day of January, 1858, notified the said defendant of such his election, and of his readiness to grant the same, but the defendant refused to accept the same.

It is agreed that either party shall be at liberty to dispute the admissibility of any of the facts stated, in like manner as the same might have been excepted to at *nisi prius*, and the court is to determine what facts are or are not properly admissible in evidence as part of this case.

The question is whether the verdict shall be entered for the plaintiff or the defendant, and judgment is to be entered accordingly.

The award made by William Phipps, Charles Edward Romain, and William M. Gorrie, recited the submission by James Forlong and James McDonell, as appearing by their respective bonds, and ordered that the said James McDonell should execute a renewal lease to the said James Forlong of the premises, for the term of twenty-one years from the expiration of the previous lease, dated the 15th of September, 1835; and that the said Forlong should pay to the said McDonell the yearly rent in the manner prescribed by the said original lease, the sum of £396 Halifax currency; or if the said McDonald should elect, as by the terms of the said lease and of the said bonds he had the option to do, to take possession of the said premises, and refuse to execute such renewal lease, then he should pay to the said Forlong the sum of £3100, in manner agreed upon between the said parties in the aforesaid bonds mentioned and prescribed, &c.,—adding directions as to costs.

A copy of the arbitration bond executed by McDonell to Forlong, in a penalty of £500, dated 9th December, 1857, was annexed to the case. It recited the lease of the premises by the plaintiff to Munroe, dated 15th September, 1856; that differences had since arisen between the said McDonell and forlong, as to the meaning of certain clauses in the said indenture, respecting the renewal of the term, the amount to be paid during such renewal of the term, and respecting certain other matters in and relating to the said indenture; that an action of ejectment had been brought by the said McDonell against the said Forlong, to recover

possession of the premises ; and that it had been agreed to withdraw the said action, and to submit the matters thereafter contained to the award of Charles Edward Romain, William M. Gorrie, and William B. Phipps, on the terms and in the manner following, that is to say :

That the said Forlong should pay all the costs of the said action at law, including proceedings in term, and that the said arbitrators should value the buildings and improvements upon the premises, which should be paid by the said McDonell to the said Forlong within one year from the date of the award, at eight per cent. interest from such award, in case he, the said McDonell, should elect to take the said buildings and improvements at such valuation, and that the said arbitrators should also fix the yearly ground rent to be paid by the said Forlong to the said McDonell, during the term of twenty-one years next succeeding the date of the expiration of the said recited demise, in case the said McDonell should elect to grant such renewal lease, it being agreed upon between the parties that he, the said McDonell, should have the election either to purchase the improvements or grant the renewal lease, according to the terms in the said recited indenture mentioned ;—and the condition was for the performance of the award to be made by the 1st of January, 1858, or such other day, not later than the 1st of February, 1858, to which the arbitrators should enlarge the time.

The lease from Forlong to Carmichael was also put in. It was made on the 6th day April, 1854, for the term of ten years from the 18th day of October, 1852, at the yearly rent of £140, payable quarterly on the 18th day of January, April, July, and October.

The lease by the plaintiff to Munro bore date the 15th day of September, 1835. *Habendum* from the day next ensuing the date thereof until the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended, at the yearly rent of £77, to be paid half yearly on the first Monday in January and July next ensuing the date thereof. Covenant to pay rent. Proviso for re-entry in case it should be in arrear for thirty days. Covenant by the lessee to pay taxes, and by the lessor for quiet enjoyment. Then followed this provision :

“And it is hereby covenanted and agreed by and between the parties to these presents, for themselves, their heirs, executors, administrators and assigns, that at the expiration of the term of twenty-one years hereinbefore mentioned, the said George Munro, his executors, administrators, and assigns,

shall and may, if by him, them, or either of them desired, retain possession of the hereinbefore described premises, and every part thereof, with the buildings thereon erected, and all and singular the appurtenances thereunto belonging, in manner as hereinbefore mentioned, upon condition nevertheless that within three months from the expiration of the said term of twenty-one years a new ground rent for the said piece or parcel of land, independant of the rent or value of the buildings at that time erected and being thereon, shall be ascertained in manner following, that is to say, each of the said parties, their or either of their executors, administrators, or assigns, shall choose an indifferent person, which persons so chosen shall nominate a third, the majority of whom shall declare and determine what ground rent as aforesaid shall be annually paid to the said James McDonell, his heirs, executors, administrators, and assigns, for the piece or parcel of land aforesaid, for and during twenty-one years next following the term of twenty-one years hereinbefore mentioned and then expired, and which ground rent so ascertained shall be paid in like manner, and at the same times, and under all and every the conditions in this indenture mentioned; and such conditions, and every of them, shall be binding upon the said parties, their executors, administrators and assigns, respectively, for the said further term of twenty-one years, as fully and entirely as if a new indenture in all respects similar and like to these presents were executed. *And it is hereby further covenanted and agreed*, by and between the parties to these presents, their heirs, executors, administrators, and assigns, that if either of the said parties, their or either of their heirs, executors, administrators or assigns, shall refuse or neglect, within the time hereinbefore specified, to choose a person who will act in the premises to determine and declare the ground rent to be annually paid as aforesaid to the said James McDonell, his heirs, executors, administrators or assigns, for the said piece or parcel of land, for and during the term of twenty-one years, to be computed from the expiration of twenty-one years herein first mentioned, then the person chosen by the party, his executors, administrators or assigns, who shall have conformed to the covenant herein contained in that respect, shall be at liberty to choose a second person, and they two a third person, the majority of whom shall decide the amount of such ground rent to be paid as aforesaid to the said James McDonell, his executors, administrators or assigns, annually, and which decision shall be binding and conclusive on the parties to these presents, their executors, administrators and

assigns, respectively : provided always, and it is hereby further covenanted and agreed, by and between the parties to these presents, for themselves and their heirs, executors, administrators and assigns, respectively, that if they, the said James McDonell, his heirs, executors, administrators or assigns, at the expiration of twenty-one years next following the date of this indenture, shall desire to resume possession of the premises herein mentioned and described, he, they, or either of them shall be at liberty so to do, upon the terms and conditions following. *First*, that he, the said James McDonell, his heirs, executors, administrators or assigns, shall give three calendar months' notice, to be computed next before the expiration of the said term of twenty-one years, of such his or their intention, to the said George Munro, his executors, administrators or assigns. *Secondly*, that the value of the buildings and beneficial improvements made at the time of the expiration of the said twenty-one years, standing and being on the said premises, shall be valued by persons chosen in the same manner as by these presents is prescribed for ascertaining the ground rent in the event of the continuance of this lease for a period beyond a term of twenty-one years first mentioned in this indenture, &c. *Thirdly*, upon condition that he, the said James McDonell, his heirs, executors, administrators and assigns, shall pay or cause to be paid to the said George Munro, his executors, administrators and assigns, the sum at which such buildings or improvements shall have been valued, within thirty days from the day on which he shall have had notice in writing of the amount of such valuation as aforesaid. *And it is hereby further covenanted and agreed*, by and between the parties to these presents, for themselves and their heirs, executors, administrators, and assigns, that at the expiration of each and every twenty-one years from the date of these presents, for ever, the said George Munro, his executors, administrators or assigns, shall remain in the possession and occupation of the said premises, with the appurtenances, upon the same terms, and subject to the same conditions covenanted and agreed upon for the renewal of this lease at the expiration of the twenty-one years next following the date thereof ; and in like manner that the said James McDonell, his heirs, executors, administrators and assigns, may resume possession of the same at the end of each and every twenty-one years, upon payment, as hereinbefore mentioned, of such sum as the building and improvements as aforesaid, at the several times aforesaid, shall in manner aforesaid be valued at. *And it is further covenanted and*

agreed, by and between the parties to these presents, for themselves their heirs, executors, administrators and assigns, that if at the expiration of the next or any subsequent term of twenty-one years no new ground rent shall be ascertained as aforesaid, or if the said premises shall not be resumed, in manner and upon the conditions hereinbefore expressed, by the said James McDonell, his executors, administrators or assigns, then the said George Munro, his executors, administrators or assigns, shall continue in the possession of the said premises, and all and singular the appurtenances, upon payment of the rent last ascertained to be payable for the same to the said James McDonell, his heirs, executors, administrators or assigns. *And it is hereby further covenanted and agreed*, by and between the parties to these presents, that upon payment by the said James McDonell, his heirs, executors, administrators or assigns, of the sum at which the buildings and improvements erected and being on the said premises at the end of any one term of twenty-one years, as hereinbefore mentioned, to the said George Munro, his executors, administrators, or assigns, in manner hereinbefore mentioned, he, the said George Munro, his executors, administrators or assigns, shall and will forthwith deliver up possession of the said premises, and every part thereof, to the said James McDonell, his heirs or assigns, in the same state and condition as they were at the time of the valuation thereof: *Provided always*, that if, after notice given by the said James McDonell, his heirs or assigns, of his or their intention to resume possession of the said premises, default shall be made in payment of the sum at which such buildings and improvements shall have been valued, in manner hereinbefore mentioned, by the said James McDonell, his heirs or assigns, then the said George Munro, his executors, administrators or assigns, shall and may continue in possession of the said premises for the further term of twenty-one years then next ensuing, upon a new valuation of the ground rent, or otherwise on payment of the said ground rent paid for the preceding twenty-one years, in manner as hereinbefore covenanted and agreed upon for the renewal or extension of the term mentioned in these presents. In testimony whereof," &c.

George Munro, by indorsement, dated 17th of February, 1843, assigned the above lease, and all his interest therein, to the defendant, who at the foot of the assignment signed the following: "I hold the above mentioned property as a trustee under Col. Forlong's marriage settlement, the purchase being a part of the trust funds named therein. (Signed), H. J. BOULTON."

Adam Wilson, Q. C., for the plaintiff.

Cameron, Q. C., contra, cited *Treke v. Lord Barrington*, 3 Br. C. C., 277 ; *Attorney-General v. Christ's Hospital*, 3 Br. C. C. 165 ; *Doc Gardner v. Kennard*, 12 Q. B. 244 ; *Friar v. Grey*, 5 Ex. 584 ; *Grey v. Friar*, 23 L. T. Rep. 334.

ROBINSON, C. J.—I take the position of the parties under the lease, and upon the facts admitted, to be this :

The landlord having given no notice before the twenty-one years expired of his intention to resume, the tenant was at liberty to continue for another term of twenty-one years, or not, as he desired.

That no notice was necessary to be given by him, either before, or at the expiration of the twenty-one years, or within any time after, of his election to continue ; but that by continuing in possession he manifested his election to take another term, and became entitled to such term, on the conditions set forth in the lease.

That according to one of these conditions, either party might within three months (lunar, as I suppose,) after the expiration of the term, take measures for having a rent for such new term settled by arbitration, neither being bound to take such measures unless he pleased.

That if neither appointed an arbitrator, and nothing was done towards fixing a new rent, they are both to be taken to be content to let the former rent continue through the next twenty-one years, and the tenant could hold accordingly at that rent.

The parties could nevertheless by mutual assent agree to have the rent adjudicated by arbitraion after the three months had run out ; and if they have done so, and a new rent has been fixed by an award which is binding upon them as a valid award, then the only question would be, what would be the effect of such award upon the lease ?

The defendant says that he is the holder of the term in contemplation of a court law, being the assignee of the original lessee, though he took the assignment in trust for another, and he denies that the submission of his *cestui que*

trust, under seal, can be treated as a submission under seal by him, the defendant, and the present holder of the term.

If that be so, and I think it is, then he contends further, that the conditions and stipulations of the lease, as to rent or otherwise, could not be discharged or altered by any thing agreed to by him not under seal, and cannot, consequently, be effected by an award made as under a parol submission by him, and that if so he must be still holding under the old rent, having done or agreed to do nothing under his seal that can affect him.

The landlord, on the other hand, insists on the rent fixed by the award, which is more than five times the original rent, and because the tenant resists the claim to such renewal rent, he has brought this ejectment against the defendant, as if he was over-holding after his term had expired.

But the dispute about the quantum of rent cannot be settled in this action, which is not brought as upon a forfeiture for non-payment of rent, but brought upon the idea that the tenant is bound to go out of possession because the twenty-one years have expired, and no new term, as the plaintiff contends, has been created. That, in my opinion, is a mistake. The tenant has not lost his term, but having elected to continue, and the landlord not having elected before the expiration of the time limited for that purpose to resume, nor indeed elected at any time otherwise than by bringing this action, there can be no dispossession of the tenant on the ground that he has not acquired the right to a new term. The only question can be, what rent the tenant is bound to pay, which is not brought before us for decision in this action.

Upon the doubt which has given rise to this litigation, namely, what was the legal effect, according to the lease, of no new rent having been fixed until the three months had run out, I have already stated that I consider it entitled the tenant to continue on the old rent. It was no default of either party, for it was not incumbent on either party to open the question of rent by forcing on an arbitration; and if both forbore to take any steps, the inference would be that both were content to let the old rent continue, though

in point of fact the omission may have been accidental, and not designed. I have no doubt this was meant by the lease, and I have no doubt now, upon reading the whole instrument, that it is the fair construction of the several provisions contained in it, though during the argument I thought otherwise.

It is upon the following provision in the lease that the question arises: "And it is further covenanted and agreed, by and between the parties to these present, for themselves, their heirs, executors, administrators and assigns, that if at the expiration of the next, or any subsequent term of twenty-one years, no new ground rent shall be ascertained, as aforesaid, or if the said premises shall not be resumed, in manner and upon the conditions hereinbefore expressed, by the said James McDonell, his executors, administrators and assigns, then the said George Munro, his executors, administrators and assigns, shall continue in the possession of the said premises, and all and singular the appurtenances, upon payment of the rent last ascertained to be payable for the same to the said James McDonell, his heirs, executors administrators or assigns."

It would have been more clear that this provision in the lease was meant to extend throughout, and to apply at the end of the first twenty-one years, as well as of any subsequent term, if instead of the words "if at the expiration of the next or any subsequent term of twenty-one years," the language had been, "if at the expiration of the first, or any subsequent term of twenty-one years," &c.

But I do not think that the word "next," necessarily means next *after the first term*, as the plaintiff's counsel contends, but rather next after the execution of the lease, which makes the proviso apply to the first term. The lease is dated before the term commenced, and by "*next term*," I think the parties meant the twenty-one years next after the date of the lease; in other words, the first twenty-one years. That would be literally the next or nearest term that would expire after the words were used, for there was not at that moment any term current.

If the words were to be otherwise construed, then no

provision would be made in the lease for the contingency of no new rent being fixed by arbitration within three months after the end of the first twenty-one years, although such a contingency might as well occur then as at the end of any other term ; and although it is clearly provided what shall be done, if at the end of the first term the landlord, having given notice of his intention to resume the premises, shall not pay within the limited time the sum at which the buildings shall have been valued. That never could have been intended by the parties ; and the nature of the provision that is made in that respect shews that the parties meant that the tenant should go on for the second twenty-one years at the same annual rent as for the first, if no new rent shall be fixed by arbitration, as the lease points out, which either party can have done if he pleases, whether the other chooses to concur in appointing arbitrators or not.

Mr. Wilson argued that the words at the end of the proviso in question "upon payment of the rent last ascertained to be payable for the same," &c., shew that this condition is not applicable at the end of the first term, but can only come into operation after there has been one renewal, for that the words "ascertained to be payable," clearly point to a rent to be fixed by arbitration according to the lease, and are not applicable to the rent fixed by the lease itself for the first term. But "*ascertained*," means, *made certain, fixed, established*, and may as well apply to a rent fixed by contract between the parties as by the award of others. The legislature have so used the term in different statutes, as in 8 Vic., ch. 13, sec. 5, 19 Vic., ch. 90, sec. 20, where the county courts have jurisdiction given to them to a certain sums where the amount is "*ascertained by the act of the parties*, or the signature of the defendant." I think the paragraph in the lease next before the one in question, and also the last proviso, both confirm what seems to me to be the proper construction.

As to the action, the plaintiff insists that the first term having expired, the defendant can clearly not maintain his possession by setting up that term ; and that, as no other term has been created, he has no right to possession.

The defendant, on the other hand, insists that he has acquired another term, under the provisions in the lease, for that the plaintiff gave no notice of his intention to resume possession, and the defendant was therefore entitled to go on for a further term of twenty-one years, if he desired it : that he has desired and intended it, and has given sufficient indication of such intention ; and that the only room for question, if there be any, is in regard to the amount of rent which he is to pay, which depends upon the point whether the award is binding upon him.

That is, I think, the position of the parties, for the defendant's refusal to accept a lease at the annual rent of £396, instead of the former rent of £77, is not a renunciation or disclaimer of his tenancy, but an assertion of his right to continue upon more favourable terms than his landlord will accede to. In my opinion, therefore, a verdict should be entered for the defendant.

MCLEAN, J.—It is, I think, manifest from the whole tenor of the lease, that it was not contemplated between the parties that a new lease should be given at the expiration of every term of twenty-one years, because it expressly provides for the tenant continuing in possession of the premises, unless the same shall have been resumed by the landlord, and the buildings and improvements paid for. The fact of the landlord not being entitled to resume possession without first paying for improvements is conclusive as to the right of the tenant to retain possession, of course subject to the payment of rent and the performance of the stipulations on his part in the lease. It is in the power of the landlord or tenant, at the expiration of any term of twenty-one years, *for ever*, to proceed to a valuation of the ground-rent to be paid for the next term of twenty-one years; and in case of no valuation being made at the expiration of any term in the manner agreed upon, the rent of the former term is that which must be paid by the tenant if he chooses to retain possession. Default for a period of thirty days beyond the time of payment of the half yearly rent may be urged by the landlord, and enforced as a forfeiture of the lease, and for such forfei-

ture he must be entitled to re-enter and hold the possession of his ground.

No new ground rent was ascertained between the parties to this suit, who now stand in the relation of landlord and tenant to each other, at the expiration of the first term of twenty-one years, and it is contended that the stipulations as to the mode of proceeding for the purpose of ascertaining the amount of ground rent to be paid do not apply to the second term, and consequently that the defendant has no right to retain possession. But I think that the fair construction of the terms of the lease is that at the expiration of the first period of twenty-one years, as well as at the expiration of every subsequent similar term, the landlord has a right to resume possession on paying for improvements, and that in case of his not choosing to do so the tenant is entitled to remain in possession at the old rent, if no new valuation has been made, or at a new rent, if ascertained in manner pointed out by the lease. It was not more incumbent on the tenant than on the landlord to take measures for establishing a new ground rent to be paid at the expiration of the first twenty-one years, though in the lease it is stated, as a condition of his continuing in possession, that a new ground rent shall be ascertained, because it is expressly provided that he may remain in possession at the old rent if no other shall be ascertained in the mode pointed out by the lease, and this provision seems to be inserted that there may be no uncertainty as to the right of the tenant, or the amount of rent to be paid, in case both parties shall have failed or neglected to take measures to establish a new ground rent.

The omission to take such measures within the time appointed at the expiration of twenty-one years, I think, entitled the present holder of the lease to continue in possession of the premises for a further term of twenty-one years, at the same rent as previously paid, and upon the same terms; but if a new ground rent has since been properly ascertained between the parties, *that* will of course be payable instead of the former rent, and unless the tenant has forfeited his lease, and the landlord seeks to recover for such

forfeiture, the tenant will still be entitled to hold subject to the rent last ascertained. The landlord in this action is proceeding as if the lease were entirely at an end, not on the ground of their having been a forfeiture of the lease. If there had been a forfeiture that does not appear in the case submitted to us, and the facts, in such a case, would be proper to be submitted to a jury. It appears to me that the lease is still subsisting, and that the holder is entitled to the possession, subject to the former rent, or any rent which since the expiration of the period of twenty-one years may legally have been ascertained and established between the parties. Under these circumstances, it appears to me that the plaintiff is not, on the facts disclosed, entitled to recover in this action, though he may be entitled to succeed in an action brought on the ground of forfeiture, if such forfeiture has actually taken place.

BURNS, J., having been absent during the argument, gave no judgment.

Judgment for defendant.

PRATT ET AL. V. DRAKE.

Promissory note—Indorser's name signed by the maker—Proof of authority—Asking for time—Estoppel.

In an action against the indorser of a note, it appeared that his name had been written by the maker, his nephew, and there was no evidence of express authority, but it was proved that defendant had before and afterwards indorsed for his nephew on purchases by him from these plaintiffs, and that when payment of this was demanded from him he had asked for time, and had not denied his indorsement until some months afterwards when the maker had absconded. His excuse was that he kept no memorandum of his indorsements and supposed it was right.

Held, that defendant had precluded himself by his conduct from disputing his liability; and the jury having found in his favour, a new trial was granted without costs.

ACTION on a promissory note of Thomas Drake, made on the 27th of October, 1856, payable to defendant Benjamin Drake, or order, for \$274.7 in four months, indorsed by defendant; with a common money count.

Pleas:—1st. Denying that defendant indorsed the note.
2nd. *Nunquam indebitatus* to the common count.

At the trial, at St. Thomas, before *Robinson*, C. J., it appeared that the claim was only for a balance of £ 30 still unpaid on the note, payments having been made on account of it by Thomas Drake, the maker.

It seemed clear that the defendant's name indorsed on the note was not in fact written by the defendant, but by Thomas Drake, his nephew, the maker of the note, who gave it thus indorsed to the plaintiffs, merchants in Buffalo, from whom he bought goods.

Thomas Drake had before dealt with the plaintiffs, and in the autumn of 1856 he wanted more goods from them, but they declined letting him have more, unless he would cover the amount by his note indorsed by some person whom their attorney, Mr. Warren, living at St. Thomas, would accept as sufficient. Mr. Warren told Thomas Drake that he would accept a note indorsed by the defendant, and such a note was accordingly brought to him, and Thomas Drake obtained the goods he required. The defendant had before that indorsed a note for his nephew Thomas in favour of the plaintiffs for other goods, which had been paid.

It was proved that soon after this note became due, in March, 1857, payment was demanded by Mr. Warren from the defendant, who begged him not to press it, as it would injure him. On that occasion the defendant did not see the note, but he stated that his nephew had indorsed his name on other notes, and that he, the defendant, had paid them.

The defendant, it was, sworn frequently gave his name as indorser, but kept no bill book.

In March or April, 1857, the plaintiff's clerk was sent over to collect this note. Defendant told him he did not wish it pressed, as it would injure Thomas, his nephew, and the clerk in consequence told his attorney to let it lie for a time. Thomas after that absconded, and it was not until December following (1857) that the defendant denied his indorsement, and refused on that account to pay it. It was sworn that payment could have been enforced from Thomas Drake while he remained here, if the plaintiffs had been aware that the indorsement was disputed, and that they had no recourse but against him.

In the meantime the nephew had got a further credit from the plaintiffs, upon a note, which the defendant indorsed.

The learned Chief Justice told the jury that, as the name of the defendant was indorsed, not by himself, but by Thomas Drake, they should be satisfied, before they could hold the defendant liable, either that Thomas Drake had express authority to indorse this particular note in defendant's name, or to indorse notes generally for him as Thomas might have occasion, or at least that there had been such a practice on the part of Thomas of using the defendant's name as indorser, recognised and sanctioned by defendant, as would fairly support the inference of an implied general authority given by the defendant to Thomas to indorse notes in his name for Thomas's accommodation. But that the evidence on that point should be clear and convincing, for that it would by no means follow that a special authority given to indorse one or more notes, would render a party liable upon other notes indorsed in the same manner without his knowledge.

But the jury were told, on the other hand, that when the defendant was applied to for payment in March, 1857, if he had any idea that this note was not indorsed by him, or with his sanction, and meant to deny his liability, he should have done so promptly, and not asked for delay, and left the plaintiffs to believe from March to December that all was right, and then first deny his endorsement after his nephew had absconded : that the defendant's excuse was that he kept no memorandum of his indorsements, and supposed it might be all right, and so asked for time ; but admitting that to be true, as it was proved that the defendant had on other occasions paid notes which his nephew had indorsed in his name, it was fair that this note should be treated as having been indorsed by his authority, after what had occurred, rather than throw the loss upon the plaintiffs, especially as the plaintiffs had every reason to suppose the indorsement was genuine, from the defendant's conduct, not only in relation to this note, but in afterwards indorsing another note for his nephew, on which he got a further credit from these same plaintiffs.

The jury gave their verdict for the defendant.

Becher, Q. C., obtained a rule *nisi* for a new trial on the evidence, to which

D. B. Read shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

My brothers have considered this case, and we are all of opinion that the defendant had precluded himself, by his conduct after payment was demanded, from disputing that he was liable upon the note, although he could no doubt say truly that the name was not written on the note by himself.

If he meant to deny that his nephew had indorsed his name on the note by his authority, he should not have asked for delay, and conducted himself in other respects in so inconsistent and undecided a manner. We think there should be a new trial without costs.

Rule absolute.

MAULSON ET AL. V. THE COMMERCIAL BANK.

Assignment in trust for creditors—Nature of the change of possession required
20 Vic. ch. 3.

In considering whether a sufficient change of possession has taken place to satisfy the statute, regard must be had to the nature and purposes of the assignment, and the circumstances of the case; and when made by a merchant for the benefit of his creditors, it is not to be expected that the assignees should remove the goods, or take exclusive possession, as in the case of an ordinary sale of goods.

The assignor may continue upon the premises, and assist in disposing of the goods, without vitiating the assignment in law, but it is a fact to be left to the jury as evidence to shew that the transfer was colourable.

Held, that upon the evidence in this case the jury were warranted in finding an actual and continued change of possession.

This was an interpleader issue, to try whether goods seized by the sheriff of York and Peel under a *fi. fa.* from this court, tested 19th November, 1857, and delivered on that day to the sheriff, upon a judgment of these defendants against Bostwick, McDonell and McDonell, were at that time the property of the plaintiffs, to whom they had been assigned by Bostwick and McDonell to be sold for the benefit of their creditors.

The assignment was not registered, and at the trial, which took place at Toronto, before *Richards*, J., the only question

was whether there had been a sufficient change of possession. The case was left to the jury, and they found for the plaintiffs.

Christopher Robinson obtained a rule *nisi* for a new trial on the law and evidence. He contended that an actual and continued possession of the goods assigned to the plaintiffs was not proved at the trial.

Boomer shewed cause.

The evidence is fully stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We think we cannot say that the verdict was wrong upon the evidence, on the only point on which it is questioned by the rule. The evidence shewed that, although the goods were not removed to another building after the assignment, they were actually taken possession of by the assignees, who exercised a continual control over them, putting persons of their own in charge, though the former owners of the goods continued to assist in disposing of them. It was sworn that one of the trustees attended daily in the store, and received the money that had been taken in: that new books were opened, every thing done in the name of the trustees, and that, besides their having given notice to the defendants in particular of the assignment, they made it public in an open manner, by distributing hand-bills. Of course nothing that the trustees could do by way of giving notice could avail, if the assignment came clearly under the Chattel Mortgage Act, and required registry, and was not registered, for then there would be but one enquiry to make, namely, whether there had been an actual and continued change of possession. We think there was in this case sufficient evidence to warrant the jury in finding that there had been such a change of possession, although the goods were not removed, for there is no case in which a removal of the goods has been held to be indispensable, although there should be more pains taken than are generally taken, even when all was fair and honestly meant (as we have no doubt was the case here) to make the change of possession palpable, so as to leave no pretence for questioning the validity of the assignment on the ground on which it has been questioned here.

These assignments to trustees for the benefit of creditors, with a view to a rateable distribution, are expressly excepted from the operation of the English Chattel Mortgage Act, but there is no such exception in our act, though it seems reasonable and convenient that they should be excepted, or, if not, that the oath of *bona fides* on which they may be registered should be modified so as to suit the case.

I have intimated in other cases that I have doubted whether such assignments come within the act—that is, whether they can properly be called sales of the goods so assigned in trust. But admitting that they must be held, as they have been, to come within the statute, then the question is, whether what has been shewn to have taken place in this case can be held to have been such a “delivery” and such an “actual and continued change of possession of the goods” (which are the words of the statute 20 Vic., ch. 3, sec. 2), as to dispense with the necessity of registering the assignment.

We think that to give a reasonable construction to the act, we must have regard to circumstances—that is, in this case, to the object and purposes of the assignment. When one man buys goods of another, we must suppose that he buys them because he wants them, and we expect him to take possession of them, and to use and enjoy them. And when, instead of that, we find that, although he has paid for the goods, or contracted to pay for them, yet he abstains from taking them into his possession, and leaves them still in the hands of the seller to be used and enjoyed by him, we naturally entertain a suspicion that all is not right—that there has been only a pretended sale of the goods, and that the transaction is a sham, by which it is hoped to deceive the public into the belief that the goods, though still in the possession of the same person, belong in fact to another, and cannot therefore be seized to satisfy the debts of the former owner. The inconsistency between the conduct of the parties and the assertion of a sale, gives rise to the suspicion, seldom unjust, that there must be a secret and fraudulent understanding between them to defraud creditors.

But in the case of an assignment like this, to trustees for

the benefit of creditors, the case is altogether different. The assignee in cases of that kind is often a person not in mercantile business, having no warehouse in his possession in which to keep goods, nor any shop in which to expose them to sale ; or he is often a retired merchant no longer in possession of such conveniences ; or, if a merchant in actual business, his warehouse or shop may be supposed in general to be occupied by his own goods. He is therefore not expected, and it is not the usual course of such transactions, that the assignee should actually remove the goods of the insolvent person from their former situation to his own premises, or to premises hired by him for that purpose. What ordinarily takes place is, that the shop in which the goods were on sale before assignment, whether owned by the insolvent in fee or held on lease, is part of the property assigned, and the goods remain there till they are disposed of, either by retail or otherwise.

Then admitting that to such cases of assignment as well as to others the statute 20 Vic., ch. 3, applies, the question is whether upon what was proved in this case the jury could rightly hold that there had been an immediate delivery of the goods, and such actual and continued change of possession as complied with the intention of the statute, regard being had to the circumstances of the case. There certainly was an immediate delivery of the goods into the possession of the assignees, who exercised all the control over them, actually, and openly, and continually, that an assignee for such a purpose could be expected to do. But it is true that though the assignees thus held the goods, and were in possession of them all the time by their clerk and servants, yet the former owners continued to assist in disposing of them. That no doubt subjected the case to suspicion, and made it necessary to submit to the jury whether the change of possession was real, or only apparent, and whether it could be said that there had in truth been a change of possession from the former owner to the assignees. The jury thought that there was no deceitful appearance, and that possession had in fact been changed, though for the benefit of all parties interested, the former owners gave their attendance and assistance upon the premises in disposing of the goods.

We think that finding was not inconsistent with the evidence. And we do not consider that what Lord Ellenborough said in *Wordall v. Smith* (1 Camp. 333) can be reasonably applied in the present case. There what was asserted was, that before the sheriff came with his execution the goods had been sold to another creditor ; but it was proved that, though a servant of such alleged vendee was immediately put into the house, yet the former owner and his wife continued to carry on the business of publican as usual, with the stock-in-trade that had been so assigned, during which time the servant employed to keep possession, when he sold beer, put the money into the till, to which they had access. Lord Ellenborough held that there was in that case no *bona fide* substantial change of possession : that a concurrent possession with the assignee was colourable, and was fraudulent and void ; and that the merely putting another in possession with the former owner of the goods was a mere mockery.

That language was just and reasonable as applied to the case which the learned judge had before him, but we cannot safely take it as a guide for the decision of this case, when the object of the assignment, and what was done under it, were so entirely unlike. If we were to set the verdict aside which has been given in this case in favour of the assignees, when there is no reason to doubt that all was done in good faith, without any secret understanding in favour of the former owner of the goods, we should be holding that the statute means in all cases not merely an actual and continued change of possession, but an *exclusive possession*, in the assignee, and that so peremptorily that a jury must be held to have decided against law, if in a case of this kind they find that there has been a change of possession, when the former owner of the goods is allowed by the assignees to give his attendance and assistance jointly with their clerk or agent, and under their control and direction, in disposing of the goods.

That this was a circumstance in the present case which might fairly be submitted to the jury, and considered by them as raising suspicion of the assignment being colourable, we have no doubt ; but it was considered and disposed of by the jury with that view, and the conclusion which

they came to in favour of the honesty of the case seems to be consistent with the truth of the case. All therefore turns on the question whether, as a point of law, the statute, as it regards change of possession, should be held not to be complied with in any case where the former owner of the goods is allowed, as very commonly is in cases of assignments for the benefit of creditors, to remain upon the premises assisting the assignees in carrying out the purposes of the assignment. We think we cannot construe the statute so strictly.

Rule discharged.

JACOBS V. THE EQUITABLE INSURANCE COMPANY.

To an action on a policy of insurance, defendants pleaded an insurance by the plaintiff with another company, without notice to defendants, or indorsement thereof on their policy, contrary to one of the conditions. The plaintiff replied, on equitable grounds, that he effected the insurance with the defendants through N. their agent, residing at E.; that when he effected the second insurance complained of he had not received the policy from defendants, and had no notice or knowledge of the said condition: that as soon as he became aware of it he gave notice to the said N. that he had effected the insurance mentioned in the plea and another insurance with the B. A. Co., and as the insurance mentioned in the plea had been cancelled at the time of giving such notice, the said N. promised to have the insurance with the B. A. Co. endorsed on defendants' policy, and told the plaintiff that it was not necessary to have the other noted, and that defendants' policy would still bind them: that after said notice the defendants made a memorandum on their policy of the insurance with the B. A. Co., and returned said policy to the plaintiff as valid and subsisting; and defendants gave no notice to the plaintiff that they considered said policy cancelled, because the omission to note the insurance in the plea mentioned arose from the neglect of the defendants and not of the plaintiff: that at the time of the loss the plaintiff had no other insurance except that with the B. A. Co., and by reason of the premises defendants waived the indorsement of the insurance mentioned in the plea.

It appeared that the policy was made at the head office in Montreal, on the 5th of June, and sent to N. about ten days before the fire, which took place on the 7th of July, but it remained with him, not being called for by the plaintiff. On the 16th the plaintiff obtained the policy pleaded, but it was cancelled on the 30th. N. was agent also for the B. A. Co., and granted to the plaintiff a policy with that company about the same time as the defendants'. On the 4th of July both those policies were sent to the respective head offices to have each marked on the other, and defendants' contest was noted on the 9th of July, and the policy returned. The agent knew of the policy pleaded before the fire, but not until after it had been cancelled.

Held, that the replication was not proved, for the omission to note the policy was not owing to the negligence of defendants; they were not aware of it while it existed, and it would have been useless to note it after it had ceased.

Held, also, that the agent could not have waived the forfeiture.

Held, also, that the replication should not have been admitted, and might be struck out under the C. L. P. A. sec. 290.

DECLARATION on a policy of insurance against fire for

£600, granted by defendants on the plaintiff's stock in trade, averring a loss, and refusal to pay.

Plea—That the said policy was and is subject to such conditions as are printed on the back thereof, and that among such conditions is the condition following: that is to say, "If the property insured with this company shall be insured elsewhere, notice of such other insurance must be stated in the policy, or by indorsement on it, otherwise the insurance with this office will be void, and the insurance not entitled to recover in case of loss; and in the event of any other insurance with any other office, and proper notice having been given, this company will pay its rateable portion only of any loss, having regard to any other subsisting policy in whose name soever such policy may be." And the defendants further say, that after the making of the said policy, and while the same was in force and effect, and subject to the same condition hereinbefore mentioned endorsed on said policy, to wit, on the 16th of June, 1857, the plaintiff effected a further insurance on his stock of dry goods, &c., which were covered by the policy in the declaration mentioned, with the Wellington District Mutual Fire Insurance Company, for the further sum of £500, and that the plaintiff did not give notice to the defendants of such other insurance, nor was the said insurance with the Wellington District Mutual Insurance Company stated in the policy in the declaration mentioned, or endorsed thereon, contrary to the form and effect of the said condition, whereby the said policy in the declaration mentioned became and is null and void.

The plaintiff was allowed to take issue upon the defendants' plea, and to put in the following replication on equitable grounds:—that he effected the said insurance, and obtained the said policy, through the intervention and agency of Walter P. Newman, then being the appointed and recognised agent of the defendants, residing in and keeping his agency in the village of Elora, in the county of Wellington, and that the plaintiff had no immediate or direct communication with the defendants, or any other of the defendants except the said Walter P. Newman, in reference to the said insurance: that at the time the plaintiff effected the insurance

in the Wellington District Mutual Insurance Company in the said plea mentioned, the plaintiff had not received the policy in the declaration mentioned, the said policy then still being in the hands of the said defendants ; and the plaintiff had no notice and was not aware of the condition on the said policy in the said plea mentioned : that afterwards, and before the said fire in the said declaration mentioned, and as soon as the plaintiff became aware of the said condition, the plaintiff gave notice to the said Walter P. Newman, as such agent as aforesaid, that he had effected a further insurance on the goods in the defendants' said policy mentioned in the British America Assurance Company, and also in the said Wellington District Mutual Insurance Company, such last mentioned insurance being the insurance in the said plea mentioned ; and as the fact was that the said last mentioned insurance had been cancelled and was not then in force, and at the time of giving to the said defendants, through their agents, as aforesaid, the said notice, there was no other insurance on the said goods in the said policy of the defendants mentioned, that the said insurance in the British America Assurance Company aforesaid, that the said Walter P. Newman, on receiving notice of the said insurance, undertook and promised to have a memorandum of the said insurance in the British America Assurance Company entered upon the said policy in the declaration mentioned, in accordance with the terms of the said condition in the said plea mentioned, and the said Walter P. Newman then gave the plaintiff to understand that as the said insurance with the Wellington District Mutual Insurance Company, in the said plea mentioned, had been cancelled, it was not necessary to have the same endorsed on or otherwise noted in the said policy of the defendants, and their insurance therein mentioned continued in full force and binding upon the said defendants ; and the plaintiff further says, that after notice of the said insurance to the said Walter P. Newman as aforesaid, the said defendants entered a memorandum of the said insurance with the British America Assurance Company on the defendants' said policy, and returned and sent the same to the plaintiff as a valid

and subsisting policy, and the defendants gave no notice whatever to the plaintiff of an intention on their part to cancel the said policy, or that they considered the same cancelled or put an end to, because the insurance with said Wellington District Mutual Insurance Company was not noted in or on the defendants' said policy through and by means of the neglect and default of the defendants, and not by reason of any neglect and default of the plaintiff; and that at the time of the said loss and damage by fire in the said declaration mentioned, the plaintiff had no insurance on the goods and property in the defendants' said policy mentioned, or any part thereof, other than the said insurance in the British America Insurance Company; and the plaintiff further says, that by reason of the premises in this plea mentioned the defendants waived the nothing on or in the said policy of the defendants of the said insurance in the said Wellington District Mutual Insurance Company, and should and ought to be in equity and justice enjoined and prevented from setting up in bar of the plaintiff's claim against the defendants under the said policy the said matters and things in the defendants' said plea set forth.

The defendants took issue on this replication.

At the trial, at Toronto, before *Richards, J.*, the evidence was to this effect:—The plaintiff insured with defendants for £600, on merchandise in his shop at Elora. The policy was made on the 5th of June, 1857, and was transmitted from the defendants' principal office in Montreal to their agent at Elora, Mr. Newman, a week or ten days before the fire occurred by which the goods were consumed, which was on the 7th of July following.

It remained in the hands of the agent, as the agent swore was usual, not being sent to the plaintiff or called for by him. The agent swore that he was not aware whether the plaintiff did or did not know of the condition in the policy respecting double insurance.

On the 11th of June the plaintiff applied to the agent of the Wellington District Mutual Insurance Company, to grant him assurance on the same stock of goods, and he

obtained a policy on the 15th of June, taking the risk from the 13th of June.

The plaintiff received the latter policy on the 18th of June, and it was afterwards, on the 30th of June, cancelled by the agent who had granted it, for reasons which the defendants' counsel offered to prove, but which the learned judge thought immaterial to give evidence of, and so rejected the testimony.

The agent of defendants at Elora, swore that from the 13th to the 30th of June the plaintiff gave no notice of the insurance he had effected with the Wellington District Mutual Insurance Company, though both he and the plaintiff resided in Elora.

The fire occurred on the 7th of July.

The defendants' agent was also agent for the British America Fire Insurance Company, and granted a policy on behalf of that company to the plaintiff, about the same time as the defendants' policy was granted to him. On the 4th of July those two policies were sent by the agent to the respective head offices of these companies at Montreal and Toronto, in order to have the insurance under each marked on the other.

The consent of the defendants to the insurance with the British America Company was noted on the 9th of July, in the head office at Montreal, and the policy was some time after returned to the agent at Elora.

The agent's brother at Elora, who frequently acted for him in his insurance agency transactions, swore that the plaintiff had never informed him before the 4th of July of his insurance with the Wellington District Insurance Office, and swore also, that the plaintiff had not the policy now sued upon in his possession until after the fire; that on the 4th of July, being about to send the other two policies—that is, the defendants' and that granted by the British America office—to the principal offices, to have each insurance noted upon the other, he called on the plaintiff and asked him whether he had effected a further insurance with the Wellington District Mutual Insurance Office, and was told by the plaintiff that he had, but that the policy had since been cancelled.

This witness stated that he wrote after he was told this to both the other companies, for the purpose already mentioned, but said nothing of the plaintiff's insurance with the Wellington District Mutual Office, because that had been cancelled, and he supposed it would be unnecessary.

He swore that he informed his brother (the agent) of this, but did not state when. It could not be before the 4th of July, however, when he first received the information himself.

The defendants' agent swore that he did know of the plaintiff's insurance with the Wellington District Company before the fire on the 7th of July, but not till after the 30th of June, when it had been cancelled.

The learned judge directed the jury to find for the defendants upon the first issue joined on the plea, and he left the issue upon the plaintiff's equitable replication to the jury. They found for the plaintiff on that issue, and gave £630 damages, as the amount of the plaintiff's loss, with interest upon it; and for the defendants on the first issue. They found also that the defendants' agent, Walter Newman, had notice of the insurance upon the Wellington District Office on the 4th of July.

Galt obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection, in this, that the evidence clearly shewed that the policy in this case was forfeited for breach of the conditions in the plea mentioned, as was proved by the finding of the jury on the first issue in favor of defendants, and the learned judge should have directed the jury that if they were satisfied of the truth of defendants' plea they should find for defendants on the second issue also, the second replication, stated to be on equitable grounds, being no defence either at law or in equity, the excuse in such replication being a waiver of forfeiture by the defendants of which no evidence was given: or to shew cause why the judgment should not be arrested, on the ground that the replication on equitable grounds disclosed no defence either at law or in equity, in this, that the ground relied upon by the plaintiff there is a waiver by the defendants of the forfeiture of the policy for breach of condition, and is an attempt by the plaintiff to set up a waiver on the part of

the defendants of a breach of condition, of which it is manifest from the statement in the replication on equitable grounds they had no knowledge; and moreover that it is clear from the said replication that the forfeiture of said policy was absolute, and could not be waived by the agent of defendants, the contract being at an end. And further, that the said replication shewd no ground for equitable relief, because the court of equity could not have placed both parties in their original position, as the breach of condition had taken place, and the courts could not have awarded compensation in such a case; and also for that the plaintiff, in his said replication on equitable grounds, does not state that he ever applied to the defendants or their agents for his policy, and it is plain from the statement in his said replication that he never did so, and he cannot therefore be allowed to set up his own laches, in not ascertaining the conditions of the policy, as an excuse for his breach of condition; or why there should not be a *venire de novo*, the finding of the jury in the said replication on equitable grounds being a mis-trial, the said replication concluding with a reference to the court for an injunction to prevent defendants pleading a plea which is a bar to the right of the plaintiff, and should therefore have been adjudicated upon by the court, and there was no issue to be tried by the jury on which damages could be assessed.

Adam Wilson shewed cause, and cited *Goodright v. Davids*, Cowp. 803; *Jones v. Carter*, 15 M. & W. 724; *Reis v. Scottish Equitable Assurance Co.*, 2 H. & N. 19.

Galt and Anderson supported the rule, citing *Phillips on Ins. Secs.* 10, 255; *Cockerill v. Cincinnati Mutual Ins. Co.*, 16 Ohio Rep. 149; *Furnell v. Thomas*, 5 Bing. 188; *Angell on Ins. Secs.* 91, 174, 175, 382; *Stor. Eq. Jur.* 1324.

ROBINSON, C. J.—I have considered the evidence, and am of opinion that it did not support the finding of the jury, upon the issue joined on the plaintiff's equitable replication to the defendants' plea, for it was not proved, as is averred in that replication, that it was owing to the negligence of the defendants, and not of the plaintiff, that the insurance with the Wellington District Mutual Insurance Company was not noted on the policy granted by defendants.

It was proved that neither the defendants, nor their agent at Elora, knew of the existence of such a policy from the time it issued to the time it was cancelled. It was in force for a fortnight unknown to the defendants or their agent, though the latter lived in the same town with the plaintiff. The defendants, therefore, could not have noted it while it was in existence. After that it would have been absurd and idle to have noted it on the policy, and the not noting it at that time was wholly immaterial. The not noting it before was not the neglect of the defendants.

So, also, it was not proved, as the replication asserts, that the defendants waived the noting on the policy—I mean that noting which alone was material, namely, while the second policy was in force.

The defendants could not have waived it, for they knew nothing of it, and if such a condition as the one referred to could be waived by the defendants' agent without the sanction of the defendants, it was not in fact so waived, for the agent did not know of the subsequent policy till it had been cancelled, and his saying then to the plaintiff that it was of no consequence, was quite true as regards any noting of a non-existing policy; and if he had said, further, that it was of no consequence that it had not been noted, that would have been a mere expression of opinion on the part of the agent, which could not affect the right of his principal. It could have led to no change of the plaintiff's position; nothing that the plaintiff could then have said or done would have signified. It was for the defendants to determine whether they would insist on the policy being void, by reason of the breach of the condition, or not.

I think, therefore, that as the premises were not proved from which the plaintiff asked the court by his replication to conclude it to be contrary to equity that the breach of this condition in the policy should be insisted upon, the defendants are entitled to a new trial without costs. And I wish to be understood, that I am much inclined to think that the replication is one that ought not to have been permitted, and that the court, or a judge upon an application under the 290th clause of the Common Law Procedure Act, would probably strike it out, for certainly, if the test spoken of by

the court of Exchequer in regard to equitable replications, in the case of *Rees v. The Scottish Equitable Assurance Society*, were to be applied, it could not be maintained. And whether that is or is not a test universally applicable, I confess I am unable to persuade myself that the answer given to the plea would form a defence in a court of equity any more than at law.

BURNS, J.—The question raised by the pleadings in this case and the evidence is very important as applied to the jurisdiction conferred upon courts of law over matters equitable in their character as affecting legal contracts. I do not think the legislature ever intended, when a plaintiff was entitled to answer a plea by an equitable replication, more than this—that the replication should so far displace the answer given by the defendants as to leave the contract declared upon untouched as a legal contract. It never could have been intended that a plaintiff might declare as upon a legal contract, and if that contract were discharged by a legal answer to it, that he might set up another contract, equitable in its nature, growing out of the legal contract, and recover upon that. If the equitable replication had the effect of so completely disposing of the legal answer as that the legal contract must remain in force, then indeed it might be said the replication did not set up a new contract, but only justified the plaintiff's claim upon his legal contract. In this case the defendants have shewn facts by their plea which if true prove that the policy has been forfeited, and at law their is an end of it. The jury have found the answer to be true, and as a legal consequence of that finding I take it that in a court of law we must hold the policy void. The plaintiff, however, has replied an equitable answer to the legal forfeiture—namely, that by reason of the defendants' agent keeping possession of the policy, he was ignorant that it contained any condition obliging him to give notice, and effected another insurance, which however in a short time was cancelled by the company granting it; and that after it was cancelled, and when he became aware that the policy granted by the defendants contained such a condition, he informed the defendants'

agent of his having effected such further insurance, and also that the policy was cancelled ; and the agent informed him it was not necessary to have that subsequent insurance noted on the policy, and delivered to him afterwards the defendants' contract of insurance. Do these facts, for the jury has found them to be true, if we take the verdict as the proof of it, resuscitate the policy, so as to leave it a legal contract enforceable at law, or do they form a ground for relief against the forfeited policy ? The true way to try the jurisdiction of this court seems to be to ask oneself if all the facts, as they appear upon the declaration, plea and replication, were embodied in the declaration, would the plaintiff's demand be a legal or an equitable one ? It appears to me, I must say, that his demand, if it can be enforced, would be an equitable demand ; and if so, he would have no standing in a court of law. The case approaching nearest the present in a court of law is that of *Wood v. Dwaris* (11 Ex. 493). The distinction is, however, obvious upon an examination of it. In that case the action was, as in this, on a policy of insurance, and the plea was that the policy was founded upon a previous proposal, which proposal was part of the contract ; and to this the plaintiff replied, upon equitable grounds, that the defendants had, previous to the granting of the policy, issued a prospectus, stating that all policies granted should be indisputable, except in cases of fraud, and setting up that this also formed the basis of the contract, and therefore fortified the demand upon the contract. In the present case the policy was not issued upon any facts upon which there could be a dispute, or that in any way made it have the operation of not being a perfect contract in itself *ab initio*, but what has occurred in this case has all taken place since the contract was made, and being a contract to be void upon a certain condition remaining unperformed, it did become void by non-performance of that contract, and if the plaintiff can have any remedy it must be as upon a new contract of waiver of the forfeiture.

This point would, I think, alone be sufficient to determine the case against the plaintiff's recovery in this action. I have, however, considered it in another point of view ; supposing that it might be conceded the plaintiff could proceed in

a court of equity, as upon an equitable demand to be paid the amount of the insurance, on the ground that the forfeiture of the policy, which has been clearly established, was subsequently waived. It is not pretended by the replication that the defendants themselves in any way waived the forfeiture, otherwise than by what was said by the agent who seems to have effected the insurance. It does not appear by the evidence that this agent had any authority to enter into a contract of waiver, but the reverse does appear. The further insurance effected by the plaintiff in the British America Insurance Office was not noted on the policy granted by the defendants by the agent, but the policy was forwarded by him to the defendants' office in Montreal for that purpose, and that was done on the 9th of July, two days after the fire had happened, and it was subsequent to that when the agent delivered their policy to the plaintiff. The insurance in the Gore Mutual was effected on the 16th of June, and cancelled on the 30th, so that for the space of a fortnight there was a double insurance, without any information to the defendants or their agent of its existence. The plaintiff says he was not aware his policy contained a condition that such information should be given, but that is of no consequence; whether he knew it or not it was part of the contract that he should give it, and he adopts that contract by suing upon it. It appears by the finding of the jury that the plaintiff gave the agent the information on the 4th of July, and that the agent said it was of no consequence to have it noted, for at that time that further assurance was cancelled. It would be absurd to hold the defendants bound to have entered into a new contract in consequence of that, when we see that in the case of the other policy the agent forwarded the policy now in question to the defendants themselves, for them to say whether they would sanction the double insurance. On the facts, as they are proved, the plaintiff had a double insurance for some time without its being sanctioned, and without defendants or their agent even knowing it, and when it was cancelled then he informed the agent, who thought, because it was cancelled, it would make no difference. I do not think any contract of waiver of the forfeiture can be said to exist, looking at it in an equitable

point of view, for it is not brought home to the defendants that they had any knowledge of the facts, and it certainly does not appear the agent had any authority to enter into a contract of waiver. The authority to effect a contract of insurance is a very different authority from that to waive conditions that are attached to such contracts.

I refer to *Acey v Fernie* (7 M. & W. 151), *Wing v. Harvey* (5 DeG. McN. & G. 265), *Hunter v. Gibbons*, 1 H. & N. 459), *Gulliver v. Gulliver* (1 H. & N. 174), *Reis. v. The Scottish Equitable Insurance Co.* (2 H. & N. 19).

The defendants' rule asks the court to grant a new trial, or to arrest the judgment. There ought not to be an arrest of judgment generally, for there is an issue found for the defendants which avoids the policy, and upon which the defendants are entitled to judgment. I do not see the way clear to arrest the judgment upon the replication, and as to granting a new trial I concur in it, though I think the court might strike out the replication under the authority of the 290th section, and I apprehend the defendants may under that section make that application to a judge, or to the court, before a trial.

MCLEAN, J., concurred.

Rule absolute for a new trial.

THE BANK OF MONTREAL V. CAMERON ET AL.

Bill of exchange—Issuable plea—Practice.

To an action on a bill of exchange by a remote endorsee, alleging the prior indorsements, against the drawer and acceptor, the latter, being under terms to plead issuably, pleaded that he was induced to accept by the fraud, covin, and misrepresentations of the drawer and indorsers, and without any consideration or value being given to him for his acceptance, and that the last indorser indorsed to the plaintiffs without any consideration or value being given by the plaintiffs to said indorser. The plaintiffs signed judgment, treating the plea as not issuable, and on application in chambers, which was supported by an affidavit of merits, the judgment was set aside for irregularity with costs, the learned judge holding the plea to be issuable. The plaintiff then moved to rescind this order.

The court refused to interfere, because as merits had been sworn to in chambers, it was right at all events to relieve defendants from the judgment, and the only question was therefore one of costs.

Quære, whether the plea was issuable or not.

Albert Richards obtained a rule on defendant Cameron to shew cause why the order made on the 13th of April,

1858, by Mr. Justice *Burns* in chambers, setting aside the final judgment signed in this cause against the defendant Cameron, should not be rescinded, on the ground that the defendant, being under terms to plead issuably, pleaded a non-issuable plea, on which account the plaintiff signed judgment against him, which judgment was set aside by the said order, on the ground that the plea was issuable.

The plaintiffs sued both the defendants, by a specially indorsed summons, on a bill of exchange, dated 29th of September, 1857, drawn by the defendant King upon and accepted by the other defendant, for £2000, payable in sixty days.

King not appearing judgment was signed against him, and the other defendant having appeared the plaintiffs declared against him, stating the bill as above, and the acceptance by defendant Cameron—that King indorsed the same to one Charles F. Ellerman, who indorsed the same to one Benjamin Dales, who indorsed the same to the plaintiffs; that the said bill was duly presented for payment and was dishonoured, of which defendant King had due notice, but did not, nor did the defendant Cameron, pay the same, &c.

The defendant Cameron obtained fourteen days' time to plead upon the usual terms, and he pleaded the following plea :—

“The defendant C., by, &c., his attorney, says that he was induced to accept the said bill of exchange by the fraud, covin, and misrepresentation of the said W. D. King, Charles F. Ellerman, and Benjamin Dales, and without any consideration or value being given to him, the said C., for the said acceptance, and that the said Benjamin Dales indorsed the said bill to the plaintiffs, without any *consideration or value being given by the plaintiffs* to the said Benjamin Dales for such indorsement.”

This plea was pleaded on the 15th of March, 1858.

On the 22nd of March the plaintiffs' attorney wrote to the defendant's attorney, pointing out what he considered to be a defect in the plea, namely, its not alleging that there was no consideration for the plaintiffs being the holders of the bill, and referring to a form of plea in Chitty's Prece-

dents as applicable. He stated that he might traverse such an averment if the plea had contained it, as he was informed that the plaintiffs did not get the bill from Dales, but from other parties, on whose title they wished to rely, as well as on their own, by giving such third party value: he stated that he would that day sign judgment, on the ground that the plea was not issuable, within the terms of the order giving time to plead, but that if he wished he might amend the plea, by inserting the allegation which it wanted, within three days, paying disbursements, and taking short notice of trial, &c., rejoining in forty-eight hours, and allowing the plaintiffs, if they should think proper to do so, to traverse the plea, and then to reply that Dales indorsed the bill to the Brockville and Ottawa Railway Company for value, who indorsed it to the plaintiffs for value. And the attorney accounted for his not having written before the time for replying was out, by his being absent from home.

Judgment by default was signed on the 23rd of March, after the time for pleading had expired, and on the 6th of April a writ of *fi. fa.* was issued against both the defendants, and sent to the sheriff of York and Peel.

The plaintiffs' attorney swore that he was informed and believed that Dales did indorse the bill before it became due to the Ottawa and Brockville Railway Company for value, and without notice of any fraud, who in like manner transferred it to the plaintiffs for value, and without notice, and before it fell due, and that the plaintiffs held and still hold the bill for value, and that the indorsements of Ellerman and Dales were in blank.

Mr. Justice Burns, on hearing the parties, held that the plea was not a non-issuable plea: that the plaintiffs were not therefore at liberty to sign judgment; and he set the judgment aside for irregularity with costs.

When the defendant Cameron moved to set aside the judgment as irregularly signed, he filed also an affidavit of merits in the usual form.

Cameron, Q. C., shewed cause, and cited Paterson's Practice, 169-172; *Steel v. Harmer*, 14 M. & W. 136; Ch. Junr. Prac. 288; *Arbouin v. Anderson*, 1 Q. B. 498;

Thellusson v. Smith, 5 T. R. 152; Anon, 1 Ch. Rep. 355; Mackay v. Wood, 7 M. & W. 420; Watkins v. Bensusan. 9 M. & W. 422.

Albert Richards, contra, cited *Bailey v. Bidwell*, 13 M. & W. 73; *Low v. Chifney*, 1 Bing. N. C. 267; *May v. Seyler*, 2 Ex. 563; *Miller v. Ferrier*, 7 U. C. R. 540; *Bank of British North America v. Sherwood*, 6 U. C. R. 214; *Muir et al. v. Cameron*, 10 U. C. R. 356; *Hunter v. Wilson*, 7 D. & L. 222, S. C. 4 Ex. 489; *Selby v. East Anglian Railway Company*, 7 Ex. 53; *Beauclerk v. Hook*, 20 L. J. (Q. B.) 485.

ROBINSON, C. J., delivered the judgment of the court.

The case of *Arbouin v. Anderson* (1 Q. B. 498), cited by Mr. *Richards*, is in point upon the question whether the plea was not insufficient in itself, and also to shew that the plaintiffs, in answer to such a plea, might shew a consideration paid between other parties upon a transfer of a note, without their replication being held bad on the ground of its being a departure from the declaration in stating the manner in which the bill came to the plaintiffs; but the question before us now is a different question—namely, whether, supposing the plea to be bad on a general demurrer for not negating that the plaintiffs held the bill for value, or that value passed upon any previous transfer of the bill between other parties, the plaintiffs were at liberty to treat such a plea as a nullity, and to sign judgment as for want of a plea, the defendant being under terms to plead issuably.

On that point *Hunter v. Wilson* (7 D. & L. 222), reported also in 4 Ex. 489, is the authority on which the plaintiffs' counsel relies. That was a plea absurd on the face of it as it stood, for the defendant might well have accepted a bill drawn for his own accommodation, and to be negotiated for his purposes, though between him and the drawer there would be no consideration, nor any consideration given to the drawer of the bill, nor by the plaintiff to any one.

There was no allegation of fraud in that case. Here

there is ; and the plea states that the defendant was induced to accept by the fraud of the drawer, and of the two parties, indorsers, through whom the declaration states the bill to have come to the defendant.

It does seem reasonable that in such a case the plaintiff, if he can meet and means to meet that defence by setting out any facts which shew the bill to have come to the plaintiff in a different manner from that which the plaintiff had himself alleged in his declaration, should set out the new facts which he relies upon for answering the defence, and we are not surprised that the learned judge who was applied to in chambers to set aside the judgment, should hesitate to take the case of *Hunter v. Wilson* as a clear authority for upholding the judgment on the ground that the plea could be treated as a nullity.

It would have been better, we think, if the defendants had acceded to what the plaintiffs' counsel proposed in his letter ; but, as it is, the learned judge being applied to thought the plea issuable, although it might have been bad on demurrer, and set the judgment aside. We should, on a similar application, have certainly set it aside on an affidavit of merits, which there was not in the case of *Hunter v. Wilson*, but which there is in this case, but would at any rate have allowed an amended plea to be pleaded ; or, if the defendant chose to rely upon the plea as it stands, would have left it to the plaintiff to demur.

It is therefore reduced, after what has been done, to a mere question of costs—that is, whether the learned judge should not have set aside the judgment without costs—and we do not think we should interfere in the present state of the case upon that ground.

Rule discharged.

BROWN V. JONES.

Pleading—Accord and satisfaction.

To a declaration for work and materials, defendant pleaded that before action he satisfied and discharged the claim "by delivering to the plaintiff according to agreement a certain promissory note," &c.

Held bad, for not averring that the plaintiff accepted the note in satisfaction.

Declaration, for work and materials. *Plea*.—"The defen-

dant says that before action, to wit, on the 31st of May, 1858, he satisfied and discharged the plaintiff's said claim, and all damages sustained by the plaintiff by reason of the non-payment of the plaintiff's said claim, by delivering to him according to agreement, a certain promissory note made by one C. C. Henshaw, for one hundred and sixty-eight dollars, and also a due bill made by the defendant to the plaintiff for thirty-eight dollars and thirty cents, payable in a week from the said thirty-first day of May, 1858."

Demurrer.—That the said plea is bad, because it is a plea of accord without satisfaction, and because it does not allege that the plaintiff accepted and received the said promissory note and due bill therein mentioned in satisfaction and discharge of the plaintiff's claim, and all damages sustained by reason of the non-payment thereof.

Freeland for the demurrer, cited *Hardman v. Bellhouse*, 9 M. & W. 596; *Stewart v. Hawson*, 7 C. P. 168; *Evans v. Powis*, 1 Ex. 601; *Flockton v. Hall*, 14 Q. B. 380; *S. C. in Error*, 16 Q. B. 1039; *Jones v. Sawkins*, 5 C. B. 142; *Gifford v. Whittaker*, 6 Q. B. 249.

McMichael, contra, cited *Chitty's forms*, 103; *Hanscombe v. Macdonald*, 4 C. P. 190.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this plea is insufficient for not averring that the plaintiff accepted in satisfaction the note of Henshaw for 168 dollars, and the defendant's overdue bill for thirty-eight dollars.

We see nothing in any late change that has been made in the law, by the Common Law Procedure Acts or otherwise, that has dispensed with the necessity of that averment by rendering inapplicable the principles that are constantly applied, and are clearly stated in the case cited by Mr Freeland, of *Hardman v. Bellhouse* (9 M. & W. 596.)

This plea, it is true, states that the defendant delivered the note and due bill to the plaintiff according to agreement, but that does not amount to affirming that the plaintiff agreed to accept them in satisfaction, though it may have been meant to convey that idea. All that it does certainly

mean is, that the defendant delivered those choses in action to the plaintiff as he had agreed, which the plaintiff himself takes upon him to assert is a satisfaction of this cause of action. The defendant does not say that the plaintiff agreed to accept them in satisfaction, or did so accept them.

It has been always held that where a party accepts goods in payment of a debt, the effect is the same as if he had received money, and that under such circumstances payment may be pleaded in the ordinary form, and the evidence will support it ; that is, what was taken as money's worth will be treated as money. But this is not a plea of payment, and a party's own due bill postponing payment for a week could hardly be regarded as payment of that part of the sum, in the same manner as any chattel expressly taken at a certain value or amount would be.

Judgment for plaintiff on demurrer.

MYRON GOULD, CARLYLE J. DAVIDSON AND DAVID BROWN
V. GZOWSKI.

Agreement to give new contract if first abandoned—Construction of—Demurrer too large—Practice.

Declaration by A. B. and C., plaintiffs. First count, that A. B. agreed to perform certain work on a railway for defendant, and having associated C. with them as a co-partner, commenced the same : that defendant became desirous of discontinuing and suspending said work, and then it was agreed between the plaintiffs and defendant in writing that it should be suspended, and at the option of defendant entirely abandoned, and if abandoned that the plaintiffs should receive from defendant another contract on a substituted line equally advantageous to them, and if the work should be resumed the plaintiffs should repay defendant a specified sum. *Breach*, that the defendant wholly refused to allow the plaintiffs to resume said work, and hindered and prevented them from so doing, and neglected to give the plaintiffs another contract, and took said work into his own hands, and gave it to other persons.

The second count alleged an agreement with all the plaintiffs to do the work, and charged that defendant refused to allow them to go on with it.

Held, on demurrer to the whole declaration, that the first count was bad, as not shewing a breach of the agreement declared upon, which was only to give a new contract if the first should be abandoned, and it was not abandoned, but gone on with.

Held, also, that the second count was good, and that there was clearly no misjoinder, both being on agreements with all the plaintiffs.

One count being good and the other bad, the court gave judgment accordingly, and not against the demurrer generally as being too large.

Declaration. First count, for that the plaintiffs Davidson and Brown heretofore, to wit, on the 29th of August,

1853, proposed and offered to the defendant, and undertook to perform for him the description of work hereinafter mentioned, on the section of the Toronto and Sarnia Railway, extending from, &c., at the prices hereinafter mentioned, that is to say, (setting out the nature of the work and prices to be paid,) and to commence the said work forthwith, and to furnish as security for the due performance thereof Samuel Farwell, of Hamilton, contractor, and Samuel Zimmerman, of Niagara, contractor, and to execute a contract containing the proper clauses as soon as the same could be prepared, and to bind themselves to complete the said work on or before the first day of January, 1855 ; and the said defendant, on the day and year last aforesaid, accepted the said proposal on the terms aforesaid, and agreed to enter into a contract as soon as the same could be prepared, making it, however, indispensable that the said plaintiffs, Davidson and Brown, should commence the work forthwith, and the said plaintiffs, Davidson and Brown, having associated with them as a co-partner the plaintiff, Myron Gould, did forthwith enter upon the said work and continue the same upon the terms of the said agreement, until the said work was suspended by the defendant as hereinafter mentioned, and were at all times ready and willing to furnish the said Farwell and Zimmerman as securities as aforesaid, and to enter into a contract containing the proper clauses ; and while the plaintiffs were in the performance and execution of the said work the defendant became desirous of discontinuing and suspending the said work, and then, to wit, on the 5th day of November, 1853, it was agreed by and between the plaintiffs and the defendant, by memorandum in writing, that the said work should be suspended, and at the option of the defendant entirely abandoned, and if entirely abandoned the plaintiffs should receive from the defendant another contract on a substituted line, which should be equally advantageous to the plaintiffs with the said above-mentioned contract so suspended, and that if the work embraced in the said first above mentioned contract should be resumed, then the plaintiffs should repay to the said defendant the sum of £436 19s. 4d., without interest, but if not, the plaintiffs

should sell and dispose of the different articles mentioned in a memorandum to the said agreement annexed, to the best advantage, and pay over the proceeds arising from such sale to the defendant, and that in the meantime the plaintiff should retain the custody of the said articles. And the plaintiffs aver that they have been at all times since the making of the last mentioned agreement, ready and willing to resume the said work, or to accept a new contract on any substituted line of railway, which should be an equivalent for the said first above mentioned contract; and that although a reasonable time elapsed for the resuming of the said work, or giving the plaintiffs a new contract on a substituted line, after the making of the said agreement of the 5th day of November, 1855, and the commencement of this suit, the defendant has wholly refused to allow the plaintiffs to resume the said work, and has hindered and prevented them from so doing, and has wholly neglected to give the plaintiffs another contract on a substituted line equally advantageous to the plaintiffs, and has taken the first above mentioned work into his own hands, and given it to other persons, whereby the plaintiffs have lost and been deprived of great gains and profits which they would have made from the performance of the work first above mentioned, in accordance with the terms of the said agreement first above mentioned, and have also been put to great expense and outlay of their moneys, in procuring stock and materials for the performance of the said work, and in keeping such stock, and in paying the wages of men employed by them for the performance of the said work.

Second count, that the plaintiffs and defendant agreed that the plaintiffs should perform the work hereinafter mentioned, on the section of the Toronto and Sarnia Railway, extending from, &c., at the prices hereinafter mentioned, that is to say, &c., and should commence the said work forthwith, and furnish as security Samuel Farwell, of Hamilton, contractor, and Samuel Zimmerman of Niagara, contractor, for the due performance of the said work, and to execute a contract containing the proper clauses as soon as the same could be prepared, and bound

themselves to complete the said work on or before the 1st day of January, 1855 ; and the plaintiffs then, in pursuance of the said agreement, commenced the said work, and continued the same until they were hindered and prevented by the defendant as hereinafter mentioned from the further performance of the said work ; and the plaintiffs aver that they were, from the time of making the said agreement hitherto, ready and willing to perform the same in all things on their part and behalf, and offered to perform the same ; but the defendant afterwards, to wit, on the 5th day of November, 1853, wholly discharged and hindered the plaintiffs from the further performance of the said agreement, and refused to allow them to continue the said work, whereby, &c.

The defendant demurred to the declaration, assigning as objections, that the first count shews an agreement made with the plaintiffs, Carlyle J. Davidson and David Brown, only, and does not shew any agreement made with all the plaintiffs ; and the second count is on an agreement stated to be made with all the plaintiffs ; and the damages claimed by the declaration are claimed by all the plaintiffs, whereas, by the declaration, the plaintiff Myron Gould had no interest in the original agreement in the first count mentioned, and for the breach of which damages are claimed.

Anderson for the demurrer.

M. C. Cameron, contra, cited *McQueen v. McQueen*, 10 U. C. R. 359.

ROBINSON, C. J., delivered the judgment of the court.

The first count of this declaration we think insufficient, as not shewing a breach of what the defendant is alleged to have engaged to do by the agreement declared upon as being made with the three plaintiffs, for the defendant only agreed to give a contract on a substituted line if the other was abandoned, at least that seems to be the meaning of the statement, but according to the declaration the first line was gone on with, and not abandoned, though the defendant, it is complained, took the work out of the plaintiffs' hands, and went on with it himself. Whether that would give a

cause of action under the agreement, looking at the terms of it, may we think well be questioned, though otherwise we should think the count sustainable. It is our opinion that this first count is bad, as not shewing a breach of the undertaking declared upon.

To the second count there is really no objection, however inconsistent it may be with the real truth of this case, and therefore with what the plaintiffs could prove, if the defendant, instead of demurring, had denied that he ever made such an agreement with the plaintiffs.

There is no pretence for objecting that there is a misjoinder in the declaration. Both counts are on agreements alleged to have been made with the same three plaintiffs.

Then holding, as we do, that the first count is good, and the second bad, the consequence would be, according to the course usually, if not constantly, taken in this province in such cases, that judgment would be given against the demurrer generally, on account of its being too large, in denying the sufficiency of the declaration when a good cause of action has been stated in one count. In England, until lately, that was the course generally taken, though perhaps not invariably, but of late the more reasonable practice has been to give judgment in favour of the plaintiff for the good count, and against him on the count held to be insufficient. The cases reported in 11 East 565, 7 A. & E. 841, 4 Dowl. 524, 3 A. & E. 741, 11 A. & E. 411, 1 M. & Gr. 201 note, 10 M. & W. 738, and 13 M. & W. 757, shew how unsettled the practice has been on this point. There has been no change made in this by the Common Law Procedure Acts, or by any late rules ; but the courts have gradually fallen into the course of giving judgment upon the whole record, upholding what is good and condemning what is bad, and have shewn a disposition to depart from the doctrine of giving judgment against the demurrer on account of its being too large. Following this course in the present case, we give judgment for the plaintiff on the second count, and for the defendant on the first ; and each party may apply within a week to amend the pleading.

Judgment for defendant on demurrer to the first count, and for plaintiff on demurrer to the second count.

SIMPSON V. THE GREAT WESTERN RAILWAY COMPANY. (a.)

20 Vic., ch. 12—Construction of—Horse killed on railway.

The plaintiff, as constable, seized a horse under a distress warrant, and put him in the stable of an inn. The horse escaped to the road, and having got upon the railway owing to defects in the cattle-guards, was killed at some distance from the point of intersection.

Held, that under the 20 Vic., ch. 12, the horse was unlawfully upon the highway, and having got thence upon the track the company were not responsible, notwithstanding the defect in the cattle-guards..

Held, also, that although the horse was upon the road without the plaintiff's knowledge or permission, yet he was nevertheless there unlawfully, for the statute obliged the plaintiff to *prevent* him from being there.

Semble, that the statute does not take away the right of action in those cases only where the animal is killed at the very point of intersection.

Semble, also, that the plaintiff had sufficient property in the horse to entitle him to sue.

On appeal from the county court, the proceedings must be certified, *and the case set down for argument*, in the term after delivery of judgment there.

APPEAL from judgments given by the judge of the county court of the county of Lincoln. 1st. Upon a demurrer. 2ndly. In disposing of a rule *nisi* for a new trial on the law and evidence, and for misdirection, which rule was discharged with costs, and the verdict given for the plaintiff for £25 was allowed to stand.

Irving, for the appellant. *W. Eccles*, contra.

In addition to the cases referred to in the judgment, the following were cited: Wallis v. Manchester, &c., R. W. Co., 14 C. B. 213; Dovaston v. Payne, 2 H. Bl. 527; Cort v. The Ambergate, &c., R. W. Co., 17 C. B. 126.

The facts of the case sufficiently appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The appeal from the judgment given upon the demurrer the court were inclined to think was not in time, according to the statute (see Ruttan v. Vandusen, 10 U. C. R. 620), and they therefore dismissed the appeal, with costs, remarking that the failure of the appeal from that judgment was of no consequence as regarded the merits of the case, for that the same point that was presented by the demurrer came up also upon the rule. (b).

(a) This case was decided last term, but accidentally omitted then.

(b) The judgment of the court below was given in January, and the learned judge certified the proceedings during Hilary Term last. The court held that it was also necessary to set down the case in that term for argument. If the case has been so set down, it has been considered sufficient in practice to give notice of argument for a day in the following term.

The facts as proved at the trial, are thus stated by the learned judge of the county court in his judgment: "The plaintiff, as a constable, seized the horse in question for school rates, under a warrant issued against the personal property of one Jabez Wills, and removed the animal to the stable of a public innkeeper, where it was secured in the usual manner, and remained until the day following. On the latter day it was discovered that the animal was gone and the plaintiff went in search, and on the next day after missing the horse his dead body was found on the defendants' railway, about one-quarter or one-third of a mile to the westward of the intersection of the town line between Louth and Clinton townships, which town line runs north and south, and the railroad east and west. Two legs of the horse were broken, and the body was fifteen or twenty feet from the track, down a small embankment.

"The cattle-guards, at the intersection of the town line road with the railroad, at the east and west sides of the public road, were not sufficient particularly on the west side, and cattle could cross from the main road to the railway track, in consequence of earth recently excavated by labourers in the work, which covered the cattle-guard, and made a passable track for persons and cattle. No foot track appeared of any animal on this crossing or earth track, but the marks of horses' feet were followed up near to it.

"The animal escaped from the stable of the innkeeper, and was not at large by any act of his, or of the plaintiff, but had broken away.

"Cattle and horses are not allowed to run at large in Louth, but are prohibited by municipal regulations."

"In the declaration it is not charged that the accident arose from any wilful misconduct or negligence of the defendants in driving their railway train; but the complaint is, that the defendants neglected to comply with the duty imposed upon them by the statute, of fencing in their track, and making proper cattle-guards to prevent cattle straying from the highway upon the railway track at the point of intersection, and that in consequence of that omission the plaintiff's

horse escaped from him "without his permission or default and being then lawfully upon the said highway, without the plaintiff's permission, near to the defendants' railway at the point aforesaid (*i. e.*, at the point of intersection), strayed and escaped from the said highway upon the line of defendant's railway off the said crossing and point of intersection of the railway with the highway, and was, whilst on the line of the said railway beyond the said point of intersection, run against and over, and killed by the locomotive and carriages of the defendants then passing on and along the said railway."

The defendants pleaded—I. Not guilty.

2. That the plaintiff was not possessed of the horse.

3. That the plaintiff's horse was not at the time lawfully upon the highway at or near the point of intersection, but was then unlawfully at large upon the highway at the point of intersection, and not in charge of any person to prevent his loitering and stopping upon the highway at the point of intersection, contrary to the provisions of the statute in that behalf—namely, the 20 Vic., ch. 12, sec. 16.

The plaintiff joined issue upon these pleas.

It was objected by the defendants' counsel at the trial, that the plaintiff, being merely in charge of the horse as bailiff, and having no interest in the horse, was not the person who should have sued for the injury: that Miller, the owner of the horse, should have brought the action. And the plaintiff's counsel objected, that the evidence shewed that the plaintiff did not *permit* the horse to be at large on the highway contrary to the statute, for that the horse got out of the stable in the inn without his knowledge, and without any negligence on his part, wherefore he contended the plea was not proved.

The judge overruled both these objections. He said, he should for the time determine that when the statute 20 Vic., ch. 12, sec. 16, provided "that no horses, &c., shall be permitted to be at large upon any highway," it did not merely mean that no one should designedly turn his horse loose upon a highway near a railway crossing, or should knowingly allow him to go there; but that the act made it his

duty to take care that his horse should not be permitted—that is, *suffered*—to get upon the highway. And as to the plaintiff's right to bring the action, he considered that the horse being by the plaintiff's seizure of him in his custody and possession, he had a special property in him sufficient to entitle him to sue.

The learned judge of the county court, Mr. *Campbell*, then, in an elaborate judgment, which is before us, took a view of the case upon the merits; and, with a degree of care and ability which entitles his opinion to much weight, reviewed the many cases which have been decided in England, and in this country, arising out of injuries received by horses or cattle upon railways; and his examination of the several decisions brought him to the conclusion, that, unless they were protected by the recent statute 20 Vic., ch. 12, sec. 16, the defendants, under the circumstances of the case, must clearly be liable, on the principal affirmed in the English case of *Fawcett v. The York and North Midland R. W. Co* (16 Q. B. 610), and acted upon in several cases in our courts; namely, that the defendants not having fenced in their track from the highway, and not having constructed proper cattle-guards at the crossing, the horse was on the road lawfully as against the company, and escaped thence in consequence of their neglect of the duty which the law had imposed upon them.

He considered, therefore, that the only question he had to determine was whether the statute placed the defendants in any better situation, and he held that the 16th clause of the statute would not protect them, because it applied only to cases where the cattle, &c., *are killed at the point of intersection*. This was the view which he took of the effect of the statute, having only its language to guide him, for it is a peculiar provision in our Railway Act, and no decision had yet taken place on it; and taking such view he determined that the defendants were liable, and he sustained the verdict.

We believe the learned judge was correct in supposing that the question he had a deal with was a new one, though the same point as to the effect of the late statute 20 Vic.,

ch. 12, in cases of this kind, had been presented to us in another case of *Ferris v. The Grand Trunk Railway Company*, in this court, which was argued in this same term, and in which we have given judgment against the plaintiffs, (a) and for reasons which equally apply in the present case.

We do not take the question to be merely whether the statute 20 Vic., ch. 12, sec. 16, deprives the plaintiff of his right of action by these words, "And no person, any of whose cattle so at large shall be killed by any train at such point of intersection, shall have any action against any railway company in respect to the same being so killed." It is necessary, we think, to look further. The whole object of the act was to secure the public as much as possible against accidents that might happen to railway trains from collision or otherwise. It could be of no consequence in a case like the present, if the train had been thrown off the track by meeting the plaintiff's horse, whether the animal was met upon the track at the point of intersection or elsewhere upon the line. The legislature, when they were passing the act, were no doubt aware that at every intersection of a highway with a railway track there would be cattle guards, because the law had provided for that, and they would naturally infer that if an animal getting on a railway from a highway should be caught by a train, it would be upon the road at the point of intersection; and we dare say they used the words which we have just quoted from the act, meaning no more by them than this—that if any animal shall be permitted to be at large upon a highway near a railway crossing, and not being in charge of any person, shall get from the road upon the railway at a crossing, and be killed, the owner shall have no action. On the other hand the language of the clause in this part is perfectly plain and explicit, so much so that we do not think it can be said to take away the right of action in terms, except in a case where the animal is killed at the point of intersection.

But that, it seems to us, is not the whole question, for still the statute has the effect of making it lawful for cattle

(a) See the case reported 16 U. C. R. 474.

to be permitted to be at large upon any highway within half a mile of the intersection of such highway with a railway or grade, unless the same shall be in charge of some person. Against that the prohibition is positive, and we agree with the opinion expressed by the learned judge that the word "*permitted*," as used in the act, does not mean that the owner of the animal shall not voluntarily and designedly permit it to be on the highway, but that at his peril it must not be permitted to be there under such circumstances. It makes no difference that this plaintiff, who sues as having a special property in the horse, having charge of him at the time, did not turn him out on the road, or let him out of the stable intentionally or carelessly, for he was bound to take care that the horse should not be suffered to get upon the highway near a railway crossing—in other words, it was his duty to *prevent it* for the safety of persons travelling along the line.

Then the statute, it is to be considered, amounts to a direct and positive prohibition against any such animal being found upon a road in such a situation without some one being in charge of him, and the plaintiff's horse clearly violated that prohibition, for he got from the road upon the railway at the crossing. Having so got upon the railway he was there unlawfully, and his owner must take the consequences of any accident that happened to him from the movement of the trains, where no wilful misconduct or negligence in managing the trains is complained of.

There is no room in this case for such doubts as were expressed by the judges in *Fawcett v. The York and North Midland R. W. Company* (16 Q. B. 610), as to whether the animal was or was not lawfully upon the highway from whence he got upon the railway.

If this horse had wandered from the road into an adjoining farm, and had got from thence upon the railway for want of a sufficient fence between the track and that farm (such farm not belonging to the owner of the horse), his owner would have been disabled from recovering, because the company would be entitled to say to him, "It is no excuse for you that we have no fence between our railway and that

other man's farm. Such a fence would be required for keeping in his cattle, but was not necessary for protecting your horse at that point of our line, for he had no business to be where he was." It can be no stronger reason in support of the plaintiff's right to recover (to say the least), that if the company had had a perfect cattle-guard that could not have been passed, his horse could not have been killed just where he was, though he might have been killed at the point of intersection, if being left to his own guidance he had not continued to wander along the highway instead of taking to the railway track.

On the part of the defendants it may be urged that the cattle-guard was not made specially to confine the plaintiff's horses or cattle, but to keep the railway clear from any animal that might be passing lawfully or unlawfully along the road which crosses it : that the plaintiff's horse was unlawfully on the road, and must therefore have been unlawfully on the railway track, having gone upon it from the road. He had no business on any part of the track, more than any person would have to go into his neighbour's yard because he sees the gate open, and the horse being on the railway, was not excused by any defect in the cattle-guards of which the plaintiff had a right to complain more than the rest of the public. The transgression of the law, which brought the horse to the point of intersection, was not done away with by his having passed the cattle-guard, if the evidence had been clear to shew that he did so. That only enabled him to get further upon the road. If the horse had crossed from the plaintiff's field to the railway for want of a fence which the Company was bound to keep up between themselves and the plaintiff, then it might have been held that the horse was lawfully on the railway track as regarded the Company. But being first unlawfully in the road within half-a-mile of the crossing, where he had no right to be unattended, he got from that road to the Company's railway; and upon the principles of the common law, as laid down in the case of *Ricketts v. The East and West India Docks, &c., R.W.Co.* (12 C. B. 160), it could be no excuse to his owner, that if there had been a good cattle-guard, the horse could not have ad-

vanced to that part of the railway on which he happened to be killed. As was said in that judgment, "No man can be bound to repair for the benefit of those who have no right."

In the circumstances, of this case it appears to us that the language of the court in *Sharrod v. The London and North Western Railway Company* (4 Ex. 580) is precisely applicable. In the latter part of Baron Parke's judgment he thus states the principle, "If in the present case the plaintiff's cattle *had a right to be on the railway*, the plaintiff has a remedy, by an action on the case against the Company for causing the engine to be driven in such a way as to injure that right.** If the cattle were altogether wrong-doers, there has been no neglect or misconduct for which the defendants are responsible. If the cattle had an excuse for being there, as if they had escaped through defect of fences which the Company should have kept up, the cattle were not wrong-doers: they had a right to be there; and their damage is a consequent damage from the wrong of the defendants in letting their fences be incomplete or out of repair, and may be recovered accordingly in an action on the case."

If this was correctly said, then, *mutatis mutandis*, it determines the present case. If the horse was lawfully on the road at the point of intersection, and had strayed from there upon the railway because the cattle-guard was defective, his owner would have been in as favourable a position as he would have been if his horse had escaped from his own field upon the railway track for want of a fence between such field and the railway which was the duty of the Company to keep up; but being in the road, and unattended at the point of intersection, in direct violation of an Act of Parliament, and straying from thence upon the railway over the insufficient cattle-guard, his owner is in no more favourable position than he would have been if the horse had broken into his neighbour's farm, and had wandered from thence upon the railway by reason of there being no fence kept up by the Company between their track and that neighbour's farm.

For all that appears the railway was well inclosed from the adjacent lands. It is clear that the horse strayed on

the track from the highway, where he had no right to be, and he could not have been on the track at all if he had not been first in the highway, contrary to the act of parliament.

We are of opinion, therefore, that the plaintiff has no right of action, not because the express words of the 16th clause extend to this case, where it says that the owner of an animal killed at the point of intersection shall not under such circumstances have an action, but because upon the principles of the common law that consequence follows, on account of the horse having got upon the railway from a place where he had no right to be, and had therefore no excuse for being on a railway at any point, and was as wrongfully there on one side of the cattle-guard as he would have been upon the other.

In our opinion, therefore, the judgment should be reversed, and a new trial granted without costs.

Judgment below reversed.

THE MUNICIPALITY OF THE TOWNSHIP OF SARNIA V. THE GREAT WESTERN RAILWAY COMPANY.

Injury to Highway—Action by Municipality—Pleading.

The plaintiffs, a township municipality, in their declaration alleged that they were proprietors of a certain public road between the fourth and fifth concessions of said township, and complained that the defendants, in constructing their railway, so negligently and unskilfully made certain drains that great injury was thereby occasioned to the plaintiffs' said road, and they were compelled to expend large sums of money in repairing the same.

Held good, on demurrer, as shewing a special injury to the plaintiffs sufficient to sustain the action; for though as a municipality they were not proprietors of the road, yet it might have been purchased by them from some joint stock company, or otherwise.

The declaration alleged that the plaintiffs were the proprietors of a public road and highway, in the township of Sarnia, in the county of Lambton, and situate between the fourth and fifth concessions of the said township, and passing from the eastward to the westward, between the said concessions; and the defendants were the proprietors of a certain railway, called the Great Western Railway, situate and extending also from the eastward to the westward, across the said township, to the south of the said road of the plaintiffs:

that there was a certain drain or water-course along the south side of the said railway, which was filled and supplied with water from the adjoining swamps: that there was a certain other drain or water-course made by the plaintiffs along and near the south side of the said road of the plaintiffs, by means of which the said road was, and of right should have continued to be drained, and rendered free of stagnant water; that there were certain swamps or pieces of land covered and overflowed with water between the said road of the plaintiffs and said railway of the defendants, the water whereof had always remained and flowed in and through said swamps, without overflowing or injuring in any way the said road of the plaintiffs, or any part thereof, &c. Yet the defendants, well knowing, &c., and contriving, &c., maliciously, unlawfully, negligently and unskillfully, made and caused to be made certain other drains and water-courses, out of and from the said drain lying alongside the said railway as aforesaid, and cut, extended, and opened the same, and still keep the same open, through and across the swamps and lands overflowed with water last aforesaid, and until they reached the said drain of the plaintiffs, and joined and intersected the same, and by and through the said drains so made by the defendants as last aforesaid, large quantities of water, which before then had flowed in the said drain of the defendants alongside the said railway, were caused to run into the said drain of the plaintiffs; and also, and by means of the said drains of the defendants, the waters of the said swamps were diverted and carried from, and prevented from running and flowing in their natural courses, as they otherwise would have done, and were carried into the said drain or water-course of the plaintiffs, so that the waters in the said last mentioned drain were raised, and by the means aforesaid caused to overflow the said road of the plaintiffs for a long space of time, and by reason of the waters so brought down and discharged by the said drains of the defendants, the said road of the plaintiffs was rendered wet and soft, and unfit for travel, and was greatly injured; and the plaintiffs were compelled to expend, and necessarily expended large sums of money in repairing the said road, and repairing the in-

juries which had been done thereto, and in rendering the said road fit to be used and travelled upon as a highway, as it before had been used and travelled upon ; and also were compelled to expend a large sum of money in enlarging their said drain, in order to carry off the water so discharged upon their said road by the said drains of the defendants as aforesaid, and in order to preserve the said road from being injured by the said water so discharged, and to prevent the said water from coming and continuing upon the said road.

The defendants demurred, assigning for causes of demurrer:

1. That the plaintiffs show no special injury to themselves, apart from the injury to the public in general.

2. That the cause of action stated is the subject of an indictment only, and not of an action of damages.

Connor, Q. C., for the demurrer, cited *Streetsville Plank Road Co. v. Hamilton and Toronto R. W. Co.*, 13 U. C. R. 600.

Prince contra, cited 16 Vic., ch. 190, sec. 25.

ROBINSON, C. J.—I do not find any such provision in our statutes respecting concession lines, or other public allowances for roads in townships, as is contained in the statute 13 & 14 Vic., ch. 15, respecting public roads within cities and incorporated towns: that is, vesting the roads in the municipality, and making it their duty to keep them in repair, and providing a remedy for the neglect of that duty.

The only objection taken to the declaration by the defendants is, that the injury complained of is of such a nature that the only remedy is by indictment for nuisance, for that the plaintiffs shew no special damage accruing to them in a particular manner, which should give them a greater right to sue in a civil action, than all persons having occasion to use the road would have. I think that objection to the declaration does not lie, for that the plaintiffs do shew a peculiar damage to them from the injury complained of, for they alleged the road to be their own, and that they were compelled to expend large sums of money in order to repair the road and secure it against further injury from the water, which they say the defendants brought upon their road from the wrongful, negligent, and unskillful manner in which the defendants constructed their railway.

That certainly is a damage sustained by the plaintiffs in particular, and not in common with all the other inhabitants of the county.

The plaintiffs aver the road to be theirs, and that they were obliged to make the repairs spoken of. All this they would have to prove upon the trial; that is, if the defendants chose to traverse their statements.

If we could say that the averments could not be true, then of course the declaration would be bad on demurrer; but we cannot hold that the plaintiffs' statements is on the face of it untrue, for we cannot tell that the road spoken of may not be one of those roads made under the Joint Stock Road Company Act, 16 Vic., ch. 190, or the previous statutes, and now owned by the municipality of Sarnia, in which case the municipality would be bound to keep it in repair, and so they have suffered a special damage, if the defendants have, by their misconduct in acting upon the powers given by their charter, occasioned unnecessarily the injury complained of.

Judgment must, I think, be given for the plaintiffs, but the defendants may amend by pleading within a fortnight on payment of costs.

MCLEAN, J.—The plaintiffs complain of an injury to a road of which they *are proprietors*, and if they are in fact the *proprietors* of the road, they certainly in their declaration shew a good cause of action. We cannot assume that they are not proprietors, though we are aware that the municipal corporations are not proprietors of the several roads which they are bound to repair and keep in order. The road stated in the declaration, for aught we can at present know about it, may be a plank or macadamized road, made by a joint stock company, and since purchased by the municipality. In such a case I incline to think that the municipality could sue for any injury as the proprietors of the road, in the same manner and to the same extent as the company by which the road was originally constructed.

If the road is in fact an ordinary road on the concession line between two concessions, and the plaintiffs have no interest in it in any other way than as representing the town-

ship, and exercising a general superintendence over the public roads, the defendants can put in issue the right of property for the plaintiffs and prevent their recovery. At present I think the declaration discloses a good cause of action, and that the plaintiffs are entitled to Judgment."

BURNS, J., having been absent during the argument, gave no judgment.

Judgment for plaintiffs on demurrer.

STANDLEY AND THE MUNICIPALITY OF VESPRA AND SUNNIDALE.

By-law—Delay—Refusal to quash.

Upon an application to quash a by-law establishing a road, where two years had been allowed to elapse, and money had been expended under it, the objections not being clearly established, the court refused to interfere.

Quære, as to the power of the court to quash for objections not appearing on the face of the by-law.

D'Arcy Boulton obtained a rule on the municipality to shew cause why their by-law No. 87 should not be quashed. 1stly. Because, the said by-law being passed for the establishment of a road in the township of Sunnidale, no notice was given of the intention to pass it, by posting up notices to that effect, as the statute requires. 2ndly. Because the road passes through the orchard and barn-yard of the applicant, which is contrary to law.

The by-law was passed on the 26th of July, 1856, and it laid out the road established by it, by courses and distances, definitely and precisely.

Read shewed cause, and cited Lafferty and The Municipal Council of Wentworth and Halton, 8 U. C. R. 232.

Boulton, contra, cited Dennis v. Hughes et al., 8 U. C. R. 444; Hodgson and the Municipal Council of York, &c., 13 U. C. R. 268.

ROBINSON, C. J., delivered the judgment of the court.

We have read the affidavits filed on both sides. There is nothing wrong on the face of the by-law. Looking at it, therefore, without the aid of any extrinsic information, we cannot say that it is either wholly or in part illegal, and

therefore subject to be quashed by this court under any power expressly given to us by the municipal acts. But the applicant complains that it is nevertheless illegal, by reason of something extrinsic and not appearing on the face of the by-law.

It was passed, he alleges, without the requisite notice being given of the intention to pass it, and moreover it runs through his orchard and barn-yard. He must have known both those objections at the time, yet he has allowed two years to pass without complaining, and in the mean time expense has been incurred by the council and by individuals in opening the road established by the by-law.

As to the notice, it is sworn by many persons, and not denied by himself, that he knew well of the application, and was present in the council when the measure was discussed, and the by-law in progress, and that he was heard upon it. There is proof, moreover, that notice as required by law was given; and what is stronger than all against his application, that he was himself one of the applicants for the very line of road as it has been established, signed the petition for it, and pointed out to the surveyor the course which he desired it to take in passing through his land, which course the surveyor adopted. That also puts an end to all pretence of complaint on his part as to the road passing through his orchard or barn-yard, for though that could not be done against his will, it clearly could be done with his consent. It seems also, that, as far as the orchard is concerned, there was none there when the road was surveyed. It may be, as the complainant asserts, that he gave his consent as he did under the expectation that there would be a railway station fixed at a certain point, which the proposed road would have led to, and that this would have made it a very desirable road for him; but that this expectation has been disappointed, and the railway station placed elsewhere.

The council or the surveyor had nothing to do with his reasons for assenting, and if he has been disappointed in that respect, his case is not an uncommon one.

It cannot be said, after reading all the papers before us, that his consent was given upon any condition expressed by

him. There are several circumstances in this case which would prevent our quashing this by-law upon a summary application, supposing our power to do so on any such ground as is assigned in this case to be without question, which we do not say it is. If no legal notice was given of the by-law, or if the road was laid out through the complainant's barn-yard or orchard contray to his will, and if these facts, or either of them, make the by-law void, the complainant can urge that in his defence against the indictment for nuisance in stopping up this road, which it seems has been preferred against him.

We discharge the rule, with costs to be paid by the applicant.

Rule discharged.

THE MUNICIPAL COUNCIL OF THE COUNTY OF WELLINGTON V. THE
MUNICIPALITY OF THE TOWNSHIP OF WILMOT.

Id. v. THE MUNICIPALITY OF THE TOWNSHIP OF WELLESLEY.

Municipalities of Wellington and Wilmot—Debt for Guelph and Dundas road—Liability of Wilmot—Right of action—Award under 14 & 15 Vic., ch. 5, sec. 7—Effect of upon the provisions of sec. 8.

The declaration alleged that by 8 Vic., ch. 7, it was enacted that the county of Waterloo should consist of certain townships named, including Wilmot and Wellesley :

That by 12 Vic., ch. 78, it was enacted that the judicial and other proceedings and property of the county of Wellington should be transferred to Waterloo, which should include these two townships :

That by the 14 & 15 Vic., ch. 5, it was enacted that Upper Canada should be divided into certain counties, one of which, Wellington, should include the township of Pilkington, formed of part of the former township of Woolwich; another, Waterloo, should include Wilmot and Wellesley; and the other, Grey, should consist of certain townships named : and that the said counties should be formed into the united counties of Wellington, Waterloo and Grey, of which union Wellington then became the senior county :

That the district county of Wellington, before the transfer of said district to Waterloo as aforesaid, under the power given to them by 10 & 11 Vic., ch. 88, had incurred a debt of £20,000, by taking £10,000 stock in the Guelph and Dundas road, and constructing a part of said road, to the value of £10,000; and that the municipal council of Waterloo, under that act and the 13 & 14 Vic., ch. 133, had incurred a further debt of £20,000, by taking £10,000 additional stock, and expending £10,000 more on the road :

That for securing part of the first debt the said district council of Wellington issued debentures to the amount of £6,000, bearing interest; and for securing the remainder of the first and part of the second debt, the municipal council of Waterloo, after the said transfer, issued debentures for a further sum of £6,000 :

That by said 14 & 15 Vic., ch. 5, in view of a dissolution between Waterloo

and Wellington and Grey, it was enacted that the townships of Wilmot and Wellesley (with others) should be responsible for their share of the debt incurred for the said road, in proportion to their assessments for 1848 relatively to those of the other portions of said Wellington District for that year: that the assessment of Wilmot for 1848 was £57,548 12s., and of the other portions of said district £420,069 12s :

That afterwards the union between Waterloo and Wellington and Grey was dissolved in due form of law :

That after such dissolution the united counties of Wellington and Grey paid £6,000, which had become due, in part satisfaction of said debt and the interest thereof :

That after such payment the union between Wellington and Grey was duly dissolved ; and just before such dissolution it was settled and determined between the municipal council of Wellington and Grey, and the provisional municipal council of Grey, that the said debt should become the debt of of Wellington only, and be paid and assumed by that county ; and that all moneys paid by Wellington and Grey in respect thereof should become the moneys and credits of, and be received and recoverable by, Wellington only—of all which defendants had notice :

That since such last mentioned dissolution the county of Wellington paid £6,000, before then due, on account of said debt :

That of the said sum so paid by Wellington and Grey the portion to be paid by defendants (the township of Wilmot), according to the statute, was £3,000, and defendants, although requested, had not paid the same : that of the money so paid by Wellington the portion to be paid by defendants, according to the statute, was £3,000, which defendants, although requested, had not paid :

That after Waterloo was set off from Wellington and Grey, and before the dissolution between Wellington and Grey, the latter counties became liable to pay £6,000 for money which had before then become due in respect of said debt and interest thereon ; and that under the said settlement so made the said debt became the debt of Wellington only, and Wellington alone became entitled to receive all moneys payable by defendants in respect thereof : that of the last mentioned sum the portion to be paid by defendants amounted to £3,000, which defendants had not paid, although requested :

That after the dissolution between Wellington and Grey, the said county of Wellington became liable to pay £6,000 in respect of said debt, of which sum the portions to be paid by defendants amounted to £3,000, and although requested they had not paid the same.

Plea.—That although, under 14 & 15 Vic., ch. 5, the townships of Wilmot, &c., were to be responsible for their share of said debt, as in the declaration alleged &c., yet before the county of Waterloo was set apart an arbitration was entered into between Waterloo and Wellington and Grey, in which the two latter counties took an active part, for the adjustment and settlement of the proportion of any debt due by Wellington, Waterloo, and Grey, which it might be just that said county, on being disunited, should take upon itself, with the times of payment, and for determining the amount due to Wellington for the said road debt, according to the respective assessment rolls for 1848 aforesaid, and the times of payment thereof ; whereby it was awarded that Waterloo should be relieved from all debts, except that connected with said road, being the debt sued for, which was by the said award determined at the sum of £3819, to be paid by Waterloo as the debentures issued on account of said road should mature.

Held, on demurrer, plea bad, for the arbitration relied upon, which was held under the 14 & 15 Vic., ch. 5, sec. 15, could not extend to the debt for this road ; and the arrangement made by the same statute as to such debt could not be interfered with or altered by the award, even with the consent of the plaintiffs.

The declaration alleged, in substance, that by the statute 8 Vic., ch. 7, relative to the division of Upper Canada into

townships, counties, and districts, it was enacted that the county of Waterloo should consist of and include the townships of, &c.—naming, the several townships, among which were Wilmot, Woolwich, and Wellesley—and that the district of Wellington should, for judicial, municipal, and other purposes, include and consist of the said county of Waterloo :

That by the 12 Vic., ch. 78, abolishing the territorial divisions of Upper Canada into districts, it was enacted that the judicial and other proceedings and property of the said district of Wellington should be transferred to the county of Waterloo ; and that the said county of Waterloo should, for all purposes, include and consist of the townships of, &c., including Wilmot, Woolwich, and Wellesley :

That by the 14 & 15 Vic., ch. 5, intituled, “An act to make certain alterations in the territorial divisions of Upper Canada,” it was enacted that Upper Canada should be divided into certain counties, one of which, named the county of Wellington, should include and consist of the townships of, &c., and Pilkington, which last mentioned township was by the said last mentioned act formed of that part of the former township of Woolwich known as the Pilkington tract: another of which counties, named the county of Waterloo, should include and consist of the townships of * * , Wilmot, Woolwich, and Wellesley ; and another of which counties, named the county of Grey, should include and consist of the townships of, &c., and that the said three counties should be formed into a union for all judicial purposes, and for all purposes whatsoever, except for the purposes of representation in the provincial parliament, under the name of the United Counties of Wellington, Waterloo, and Grey, of which union of counties the said county of Wellington thereby then became the senior county.

That the district council of the said former district of Wellington, previous to the transfer of the judicial and other proceedings and property of the said district to the former county of Waterloo, as hereinbefore mentioned, did, with a view to the construction of the road known as the Guelph and Dundas road, otherwise known as the Brock road, incur a certain amount of debt, to wit, £20,000, pur-

suant to the powers granted to them in that behalf by the 10 & 11 Vic., ch. 88, by taking shares in the capital stock of the said company to the amount of £10,000, and also by constructing a portion of the said road, to the value of £10,000 :

That the municipal council of the said late county of Waterloo did, under the authority of the said last mentioned act, and of the 13 & 14 Vic., ch. 133, amending the same, with a view to the construction of the said road, incur a further amount of debt, to the amount of £20,000, by taking further shares in the capital stock of the said company to the amount of £10,000, and also by constructing a further portion of the said road to the value of £10,000 ; and that, for securing part of the said first mentioned debt, the said district council of the said district of Wellington did, previous to such transfer as aforesaid of the judicial and other proceedings of the said district of Wellington to the former county of Waterloo, issue debentures to the amount of £9,000, bearing interest after the rate of six per cent. per annum ; and that, for securing other parts of the said first mentioned debt, and part of the said last mentioned debt, the municipal council of the said former county of Waterloo did, after such transfer as aforesaid, issue debentures to the amount of £6,000, bearing interest after the aforesaid rate :

That by the said statute 14 & 15 Vic., ch. 5, it was enacted, in view of the dissolution of the union between the said present county of Waterloo and the said counties of Wellington and Grey, and that the townships of Waterloo, Wilmot, Wellesley, and that part of the former township of Woolwich not included in the present township of Pilkington, should be responsible for their share of the debt incurred or to be incurred for the construction of the said Guelph and Dundas road, so also otherwise known as the Brock road as aforesaid, in proportion to their respective assessments for the year 1848 relatively to the corresponding assessments of the other portions of the said late district of Wellington for that year, and should have a lien on the road for the amount of any payments they might be called on to make in consequence of such liability :

That the assessment of the said township of Wilmot for the year 1848 was £57,548 12s. ; and the assessment of the other portions or remainder of the said late district of Wellington for the said last mentioned year was £420,069 12s.:

That afterwards, and before the commencement of this suit, the union between the said present county of Waterloo and the said counties of Wellington and Grey was dissolved in due form of law :

That after such last mentioned dissolution the said united counties of Wellington and Grey paid a large sum of money, to wit, £6,000, which had before then become due and payable, in part satisfaction of the said debt so incurred as aforesaid for the construction of the said road, and the interest thereof :

That after such last mentioned payment, and before the commencement of this suit, the union between the said united counties of Wellington and Grey was dissolved in due form of law ; and that, just before the dissolution of the union of the said counties of Wellington and Grey, it was settled and determined between the municipal council of the said united counties of Wellington and Grey and the provisional municipal council of the said county of Grey, according to the statute in that behalf, that the said debt and debentures should become the debt of the said county of Wellington only, and be paid and assumed by the said county of Wellington, and that all moneys at any time paid by the united counties of Wellington and Grey, for, upon, or in respect of the said debt or debentures, should be and become the moneys and credits of the said county of Wellington only, and be received and recoverable by the said county of Wellington only, of all which facts and premises the defendants, before the commencement of this suit, had notice:

That since such last mentioned dissolution of the union of the said counties of Wellington and Grey, and before the commencement of this suit, the said county of Wellington paid a large sum of money, to wit, £6,000, which had before then become due and payable, in further part satisfaction of the said debt so incurred as aforesaid for the construction of the said road, and interest thereof :

That of the said sum of money so paid by the said united counties of Wellington and Grey aforesaid, the portion to be paid by the defendants, according to the statute in that behalf as aforesaid, amounts to a large sum of money, to wit the sum of £3,000; and that defendants have not, although often requested so to do, paid the said last mentioned sum of money, or any part thereof :

That of the said sum of money so paid by the said county of Wellington as aforesaid, the portion to be paid by the defendants, according to the statute in that behalf, as aforesaid, amounts to a large sum of money, to wit, the sum of £3,000; and that the defendants have not, although often requested so to do, paid the said last mentioned sum of money, or any part thereof :

That after the county of Waterloo was set off from the union of the counties of Wellington, Waterloo, and Grey, and before the dissolution between the remaining united counties of Wellington and Grey, the said united counties of Wellington and Grey became liable to pay a certain other large sum of money, to wit, £6,000, for money which before then had become due and payable, of, upon, and in respect of the said debt so incurred as aforesaid for the construction of the said road, and the interest thereof; and that under the said settlement, so made between the municipal council of the said united counties of Wellington and Grey and the provisional municipal council of the said county of Grey as aforesaid, the said debt and debentures became the debt of the said county of Wellington only, as aforesaid, and the said county of Wellington alone became and is entitled to receive and recover all moneys payable by the defendants, for, upon, and in respect of the same :

That of the said last mentioned sum of money which so became payable by the said united counties of Wellington and Grey, and for which the said county of Wellington is liable as aforesaid, the portion to be paid by the defendants, according to the statute in that behalf as aforesaid, amounts to a large sum of money, to wit, £3,000; and that the defendants have not, although often requested so to do, paid the said last mentioned sum of money, or any part thereof :

That after the said dissolution of the union between the united counties of Wellington and Grey, and before the commencement of this suit, the said county of Wellington became liable to pay a certain other large sum of money, to wit, £6,000, for money which before then had become due and payable, upon and in respect of the said debt so incurred as aforesaid for the construction of the said road, and the interest thereof :

That of the said last mentioned sum of money, so payable by the said county of Wellington as aforesaid, the portion to be paid by the defendants, according to the statute in that behalf, as aforesaid, amounts to a large sum of money, to wit, £3,000; and that the defendants have not, although often requested so to do, paid the said last mentioned sum of money, or any part thereof.

A count was added for money paid, and for interest.

Defendants pleaded—1. Never indebted.

2. That although, under and by virtue of the act 14 & 15 Vic., ch. 5, of the parliament of this province, passed during the session thereof held in the fourteenth and fifteenth years of Her Majesty's reign, intituled, "An act to make certain alterations in the territorial divisions of Upper Canada," the townships of Waterloo, Wellesley, and that portion of the township of Woolwich not included in the township of Pilkington, were to be responsible for their share of the debt incurred for the construction of the Guelph and Dundas road in proportion to their respective assessments for the year 1848 to the corresponding assessments of the other portions of the late district of Wellington for that year, as the plaintiffs have in their declaration alleged, which said debt now sought to be recovered is identical with the said debt so to be apportioned as aforesaid; and that, by the said recited act, the said townships of Waterloo, Wilmot, Wellesley, and Woolwich, and the township of North Dumfries, were made to compose the county of Waterloo, and were united to the counties of Wellington and Grey for municipal and judicial purposes, as in the said act provided, until the said counties should be separated in due course of law. And the defendants further say, that before the said county of Waterloo was set apart, as by the said act is pro-

vided, an arbitration was had and entered into between the said county of Waterloo and the said united counties of Wellington and Grey, in which the said united counties of Wellington and Grey took an active part, for the adjustment and settlement of the proportion of any debt due by the said united counties of Wellington, Waterloo, and Grey, and which it might be just that the said county, on its being disunited from such union, should take upon itself, with the time or times of payment thereof, and for determining the amount due to the county of Wellington for the Guelph and Dundas road debt, according to the respective assessment rolls for the year 1848, as aforesaid, and the time or times of payment thereof, whereby it was awarded that the county of Waterloo should be relieved from the payment of all debts, except that connected with the Guelph and Dundas road (which is the debt hereby sought to be recovered), which was by the said award determined at the sum of £3,819, upon the basis of the comparative assessments for the year 1848, to be paid by the county of Waterloo as the debentures issued on account of the said Guelph and Dundas road shall from time to time mature.

The plaintiff took issue on both pleas, and also demurred to the second plea, on the following grounds :

1. For that it appears that the county of Waterloo was not nor is liable for the moneys in the declaration claimed.

2. For that no reason is given why the defendants should not pay the said moneys.

3. For that the award mentioned is void, and contrary to the said act of parliament of this province intituled, "An act to make certain alterations in the territorial divisions of Upper Canada," in the said second plea mentioned.

4. For that the plea attempts to establish a different liability from that mentioned in and created by the said act of parliament.

5. For that the plea shews that the claims in the declaration mentioned were not adjudicated upon or settled by the award.

6. For that the plea amounts to a plea of never indebted, and sets forth matter of evidence only.

Wilson, Q. C., for the demurrer ; *Irving*, contra.

ROBINSON, C. J., delivered the judgment of the court.

The demurrer is to the second plea. The defendants gave no note of exceptions to the sufficiency of the declaration ; and the only question therefore into which we can be called upon to enter, is, whether the plea is a good answer to the plaintiffs' statement of their cause of action.

In the declaration the plaintiffs assert a legal liability of the township of Wilmot to pay to the county of Wellington a sum of money as its proportion of the debt incurred on account of the Guelph and Dundas road, and they rest their claim upon the 8th clause of the statute 14 & 15 Vic., ch. 5, which imposes this burthen upon the township of Wilmot, and which directs also upon what principle of computation the amount of liability shall be ascertained.

The defendants, not questioning, as they might have done by demurring, whether the claim which the plaintiffs set up results in law from the facts and proceedings which they have stated, defend themselves against the plaintiffs' action by setting up an award made between the county of Waterloo, when it was about separating from the counties of Wellington and Grey, and those counties which were still to remain united ; and we must take them to mean by this plea that this award has made such a change in the rights and liabilities of the respective parties to this action, that the county of Wellington, in consequence of the award, can no longer sustain such an action as the present—that is, an action holding the township of Wilmot legally liable to the county of Wellington for a sum of money ; though they do not deny that in the absence of such an award the plaintiffs' action could have been sustained.

Why and how the award is fatal to the plaintiffs' recovery against the defendants we are not informed in the plea ; but the defendants have contended in the argument that the effect of the award which they have stated in the plea is to shift the liability from the townships upon which it was imposed by the 8th clause of 14 & 15 Vic., ch. 5, to the county of Waterloo, which they maintain is now liable under the award to the county of Wellington for the portions of the debt due by the townships which are made responsible by

that clause ; and that the amount which the county of Wellington can claim can be no other than the exact sum awarded—namely, £3819—to be paid by the county of Waterloo as the debentures shall mature. It is urged, as we understand, by the defendants, that if the county of Wellington has any claim for the portion of the debt which the statute makes the township of Wilmot liable to contribute, it can only be a claim upon the county of Waterloo, and such claim as to amount and terms of payment as is settled by the award.

But if we admit, which the plea in effect does, that if no such award had been made the plaintiffs could have sustained their action, it is clear, we think, that the right of action cannot have been defeated or interfered with by this award. There was no authority given by any statute for entering into an arbitration respecting the apportionment of this road debt. On the contrary, there was no room left for an arbitration on that subject, for the legislature, by the 8th clause, had made a special provision respecting that debt, which left nothing unsettled. The enactment is clear and positive ; not that the county of Waterloo, as a county, should have any thing to pay on account of that debt, but that, with a certain exception, the townships which compose that county should contribute ; and the statute directs also how the amount which they shall contribute shall be estimated ; giving a rule which enables any one, with the assessment rolls for 1848 before him, to compute it to a farthing.

As to all other debts which were due by the union of the counties before the separation, the 7th clause of the same statute, referring to the 15th clause of 12 Vic., ch. 78, had made provision for an adjustment of them by arbitration, in case the municipal council of the united counties and the provisional council of the county about to separate could not settle the matter by agreement. But as regards the debt for the Guelph and Dundas road, there could have been no failure of the councils to come to an agreement, for they had nothing to agree about. The statute had settled the matter precisely and finally, and there could be no necessity and was no authority for an arbitration. The arrange-

ment made in this respect by the legislature is one in which the ratepayers in the several localities are interested, and the county councils were not at liberty to supersede it by entering into an arbitration respecting it with a view to altering the arrangement, either as to the amount or otherwise, by an award.

The plea states that the united counties of Wellington and Grey took an active part in the arbitration spoken of ; and this, we suppose, is stated under the idea that the plaintiffs in this suit, the Municipal Council of Wellington, can and will be held bound by their voluntary submission, though such an arbitration may not have been called for or authorized by the statute. But these are corporations for the purposes of government, and they are not at liberty to adopt proceedings, not only unsanctioned by law, but tending to unsettle what the law has settled. They cannot set up an arrangement made by themselves, or through arbitrators of their appointment, as a substitute for a settlement which has been made by act of parliament ; and, besides, the plea does not expressly state that this matter of the road debt was in point of fact included in the submission. For the purpose of adjusting the other debts an arbitration was proper and necessary, and was expressly sanctioned by the statutes ; and as regarded those other debts the counties of Wellington and Grey might well take an active part, though for all that appears they might have taken an active part in preventing the award extending to the road debt, for which the statute itself had made such a provision as it is evident from the words used in the end of the 8th clause was designed to exclude that particular debt from being adjusted by arbitration.

For these reasons the plea, resting as it does upon the alleged award, constitutes no defence to the action, on whatever other grounds the plaintiffs' cause of action might have been resisted ; and we therefore give judgment for the plaintiffs upon the demurrer.

Judgment for plaintiffs, on demurrer.

THE MUNICIPAL COUNCIL OF THE COUNTY OF WELLINGTON v. THE
MUNICIPALITY OF THE TOWNSHIP OF WILMOT.

ID. v. THE MUNICIPALITY OF THE TOWNSHIP OF WELLESLEY.

Guelph and Dundas Road—Liability of Wilmot and Wellesley for debt contracted for such road—Right of action by County of Wellington—Recovery of interest on money paid for interest.

Where principal and interest is paid for another, interest may be recovered on the whole payment.

Held, that under the 14 & 15 Vic., ch. 5, sec. 8, and 12 Vic., ch. 78, sec. 15, the county of Wellington might maintain actions against the townships of Wilmot and Wellesley respectively, for moneys paid on account of the Guelph and Dundas Road, as well by the united counties of Wellington and Grey before the dissolution, as by Wellington afterwards.

As to the first mentioned payments, the 12 Vic., ch. 78, sec. 15, must be taken to allow such a recovery, notwithstanding the technical rule of law against assignment of debts.

Held, also, that on the special count any part of the debt actually due for such roads might be recovered, though it had not yet been paid.

Quære, whether the county could have enforced payment by levying a rate on these townships.

The by-laws for contracting such debt having been passed by the District of Gore before the 12 Vic., ch. 81,—*held*, that it was not necessary that such by-laws should impose a special rate, as required by that act.

The special pleadings in these cases are set out in the report of the demurrer to the second plea, ante, page 71.

In both cases the declaration contained a count for money paid, and a count for interest; and in each case, besides the plea demurred to, the defendants pleaded that they never were indebted in manner and form, &c.

Upon the trials, which took place at Guelph, before *Hagarty*, J., a statement was handed in, shewing the amount of liability of the townships respectively, according to the 8th clause of this act.

The award set out in the second plea was produced. It was not among the papers returned with the records, but was assumed by the court to be correctly set out in the plea. It was made on the 12th of January, 1853.

It was proved that part of the moneys claimed in each suit, though it had fallen due at the time of bringing this action, had not yet been paid by the county of Wellington. This amount in each case was stated separately from the amount that had actually been paid.

No part of the debt incurred for the construction of the road had been paid from the tolls received; they had never equalled the expenses of keeping up the road.

The by-laws passed by the Municipal Council of the District of Gore, on the 16th of December, 1847, and 7th of November, 1848, which authorised together the raising of £10,000 by way of loan, to be applied in taking stock and in constructing the road, did not impose any special rate for paying the principal or *interest* of the debentures; but merely provided that the loan should be raised on the credit of the District of Wellington, and of the tolls to be imposed upon the road.

It was objected in each case upon the trial :

1st. That the action was not maintainable, for that the township was not by law made liable to the county of Wellington.

2nd. That the by-laws were invalid, because they made no provisions for a special rate to pay the debt and interest, and consequently neither the counties nor any township ever were legally liable, or could be made liable to pay the debt incurred under such by-laws.

3rd. That there should have been special rates for this special purpose, and that the defendants could not be made liable for payments made out of the general funds of the county.

4th. That at any rate the defendants (the Township Municipality) could only be liable to the amount of the sums actually paid by the county of Wellington, and not for any amount due but not yet paid.

5th. That the award put in constituted a good defence to this action. This objection, it will be seen, is disposed of by the judgment given upon the demurrer, ante, page 71.

A verdict was taken in each case for the whole amount claimed, excepting the interest claimed upon money paid for interest due upon the debentures and leave was given to each party to apply to the court, upon which application the following rules were granted :—

The verdict in the case against the township of Wellesley was for the plaintiffs, for £366 8s. 1d.

Cameron, Q. C., for defendants, obtained a rule *nisi* to reduce it to £338 11s. 8d., or to such other sum as the court should think right; and for a new trial for excessive damages, and on account of an alleged miscalculation by

the plaintiffs' witnesses in stating the amount of the plaintiffs' claim, the same sum being twice charged in the plaintiffs' account put in at the trial.

Wilson, Q. C., for the plaintiffs, obtained a cross rule to add £16 18s. 7d., which was struck out at the trial, on the objection that the plaintiffs could not be allowed to recover interest upon such money as they had paid for interest chargeable against the defendants, because that would be in effect allowing compound interest. He cited upon this point *Petre v. Duncombe*, 15 Jur. 86.

In the case against the township of Wilmot, the verdict was for £883 7s. 2d., and the plaintiffs' rule was to increase the verdict by adding to it £39 19s. 6d., being the amount of interest upon interest paid by the plaintiffs for the defendants, and disallowed at the trial, but with leave reserved to the plaintiffs to move to have the same added to the verdict.

And the defendants obtained a rule on the plaintiffs to shew cause why the verdict should not be set aside, and a verdict entered for the defendants, or a nonsuit, upon leave reserved at the trial; or why the verdict should not be reduced to £808 os. 10d., or such other sum as the court should deem just, on leave reserved at the trial; or why a new trial should not be had, on the ground that the damages were excessive, and on account of a miscalculation by the plaintiffs' witnesses of the amount of the claim, the same sum being twice charged in the plaintiffs' account put in at the trial.

The arguments, and the statutes referred to, sufficiently appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiffs' rule for adding to the verdict the disallowed interest ought, we think, to be made absolute in each case, if it be the opinion of the court that the plaintiffs are entitled to maintain their action against the defendants; because, when one person pays for another the principal and interest of a debt which such other person owes to a third party, the whole sum stands on the same footing as money paid by one on account of the other, and should all draw interest alike.

But the first point to be determined is whether the plain-

tiff's are entitled to recover for anything, which question is open to us upon the plea of never indebted.

As to the first and principal objection; it raises the question whether the declaration states a good cause of action by the plaintiffs against the defendants to any extent, for the statements in the declaration were made out by the evidence and the statutes referred to. This depends upon the provisions of several acts of the Provincial Parliament, which we are bound to notice, and chiefly upon the 8th clause of the 14 & 15 Vic., ch. 5, which enacts, "that the townships of Waterloo, *Wilmot* and *Wellesley*, and that portion of the present township of Woolwich not included in the new township of Pilkington, *shall be responsible* for their share of the debt incurred or to be incurred for the construction of the Guelph and *Dundas Road*, in proportion to their respective assessments for 1848," &c., "and shall have a lien on the road for the amount of any payments they may be called on to make in consequence of such liability."

There was no attempt on the argument to deny that the township sued in each case was legally liable to pay its proportion of the debt referred to. Upon that point, indeed, the act is express, and leaves no room for doubt. But upon other points in the case the arguments took a wide range. Taking the case against the township of Wilmot, the defendants have insisted that, though they cannot deny their legal liability, yet :

1st. It is not a liability that can be enforced in an action at law.

2nd. That even if it could be so enforced, yet these plaintiffs, the Municipal Council of the county of Wellington, are not the parties entitled to sue.

3rd. That if they were, yet that they, the Municipality of Wilmot, are not the parties against whom the action should be brought.

4th. And it is also contended that, at any rate, there can be no recovery in this action in respect of any sum beyond what the county of Wellington had *actually paid* on account of the debt and interest before they brought this action.

Now as to the first point—whether the liability imposed by

the eighth clause can be made the subject of an action at law—there is nothing in the clause or in the statute, it is true, which gives such an action in express terms. But the county has a general capacity to sue and the township to be sued, and the statute creates a debt which it cannot be denied would on general principles be a legal ground of action ; and, supposing these to be the upper parties, an action must lie, unless some other means of enforcing the demand is provided by statute, and unless we can hold that the party having the claim is confined to such method of proceeding.

This is not a case coming under the statute 12 Vic., ch. 78, sec. 15, for that applies only to debts due from a junior county to the county or counties from which it has been dis-united, whereas this is a debt due from a *township*. We have looked over all the statutory provisions, as well those respecting our municipal corporations as those respecting the levying rates and assessments, and we find nothing that we can say controls the remedy by action, which would ordinarily arise from such a provision as that contained in the eighth clause of 14 & 15 Vic., ch. 5. The two by-laws which authorised the loan, and thus laid the foundation of the debt referred to in the eighth clause, were passed by the District Council of Gore under the first municipal council act 4 & 5 Vic., ch. 10, which act did not require that by-laws for raising a loan should impose a special rate in addition to all other rates for paying the debt and interest.

Neither did the statute 10 & 11 Vic., ch. 88, sec. 32, which authorized the District of Wellington to take stock in the Guelph and Dundas Road, or to borrow money to pay for it, require any such special rate to be imposed. It simply allowed the District to borrow the money on the credit of the District. So we cannot say that the by-laws passed in 1847 and 1848, which authorised the money to be raised by loan upon the credit of the District, and of the tolls to be imposed on the road, were contrary to the law as it then stood. They are not void for not conforming to conditions which were first imposed by the subsequent statute 12 Vic., ch. 81, secs. 175–179.

But the fact that no special rate was imposed by those by-laws for paying off the loan, renders inapplicable several clauses in the late statutes which regard the collection of such rates in the case of alterations made in the territorial divisions ; and it seems to us not easy to find in any of the statutes a clear authority for any county council levying or causing to be levied within a particular township a rate for the purpose of paying the interest or principal of debentures for which the county is bound, and to which debt such township is liable to contribute, but for the payment of which debentures or other debt no special rate has been imposed.

On this point we refer to 12 Vic., ch. 78, sec. 15 ; 12 Vic., ch. 81, secs. 176, 177, 179 ; 14 & 15 Vic., ch. 5, secs. 7, 8, 16 ; 14 & 15 Vic., ch. 109, secs. 18, 19, 20, 22 ; and 16 Vic., ch. 182, secs. 34, 39, as bearing more or less on the subject, especially the 12 Vic., ch. 81, sec. 176 ; 14 & 15 Vic., ch. 109, secs. 18, 19, and 16 Vic., ch. 102, secs. 34, 39. We do not doubt the power of the municipality of the township to levy by rate whatever amount it might be necessary for them to raise in order to fulfil the obligation thrown upon them by the 8th clause of 14 & 15 Vic., ch. 8 ; but that is not the question here. We see that the townships in these cases have desired to avoid the payment, and the legislature never meant to leave the county, which is liable upon the debentures in the first instance, to depend upon the willingness of townships to carry out the provisions of the act.

When we say that the statutes do not to our minds contain a clear authority that could be used in this case by the county council for levying or directing to be levied by rate such sum as may be due to them from the township of Wilmot under the eighth clause, we do not wish to be understood as expressing a confident opinion that such a course is not open to them. Perhaps we should feel ourselves safe in holding that it is ; but if it were, still we do not consider that that would disable the county having the claim from enforcing the payment of so clear a debt by action. Although in the eighth clause nothing happens to have been

said about the manner of enforcing payment of the debt which it created, yet there are clauses in several statutes which show that in similar cases the legislature did look to the mode of enforcing payment by action as the proper remedy. We refer to 12 Vic., ch. 78, sec. 15 ; 14 & 15 Vic., ch. 5, sec. 7, and 14 & 15 Vic., ch. 109, secs. 19, 20.

On these grounds we think the claim, under the eighth clause, may be enforced by action.

Then as to the second point, which is the proper party to sue. It is possible that the legislature intended by the eighth clause to enable the holders of the debentures to sue the municipalities of the townships mentioned in it, and it might be urged that this is really the effect of the clause, but we do not think it is.

The provisions contained in these clauses of the municipal acts, which guard the interests of the holders of debentures, in cases where alterations have been made in territorial arrangements by disuniting counties or otherwise, shew that the legislature did not legislate upon the subject in that spirit.

They have always evidently intended to leave the holders of debentures upon better ground than by making it necessary for them to split their demand, and pursue a remedy against a fraction of the former municipalities which gave them the security they hold. Whether the holders of the debentures in this case could or could not sue the township of Wilmot for its share of the debt under the eighth clause, they certainly are under no necessity of doing so, but need look no further than to the county of Wellington, which is liable to them for the whole amount, and must pursue its own remedy for contribution against the inhabitants of those other portions of the county which are bound by law to contribute.

Assuming, as we do, that an action may be brought by the municipality liable upon the debentures in the first instance, we do not see on what ground it can be maintained that the county of Wellington is not the proper county to sue. The justice of the case is plain, and it would be unfortunate if any technical difficulty prevented the carrying out

the arrangements made between the counties of Wellington and Grey when they separated, and which no doubt have been acted upon since by both in good faith. We mean the arrangement made, as we suppose, under the 15th clause of 12 Vic., ch. 78, under which, as is set forth in the declaration, it was agreed between the counties of Wellington and Grey, when they were about to be disunited—or rather between the actual council of the united counties and the provisional council of Grey—that this debt for the road and the debentures issued on account of it should become the sole debt of the county of Wellington, and should be paid by that county; and that the payments made by these two counties, while united, should go to the credit of the county of Wellington only, and should be recoverable by it.

The county of Wellington claims in this action to be re-paid by the township of Wilmot its proportion, estimated as directed by the eighth clause of 14 & 15 Vic., ch. 5, of the payments on account of the road debt and interest which the united counties of Wellington and Grey had made before their dissolution, as well as of the money afterwards paid on the same account by the county of Wellington. For the latter part of the demand the claim of the county of Wellington to sue seems undeniable; but it is objected, as regards the amount paid by Wellington and Grey while united, that the county of Wellington cannot be allowed to sue alone by virtue of the settlement alleged to have been made between the two counties, for that would be proceeding upon the assignment of chose in action so far as regarded the portion of the payment that had been advanced by the county of Grey—that is, levied upon the rate-payers of that county—while it formed one of the two united counties. We think, however, that it was competent to the counties, under the authority of the statute referred to, to make such a transfer of debts and credits. It was an equitable compromise, such as the act seems to sanction and render legal.

The county of Grey might, after its separation, have been made to pay a proportion of that debt to the senior county, which senior county was in the first instance bound to the full extent to the holders of debentures, though they, the

holders of debentures, were not deprived of their recourse against all that were originally bound by them. In the adjustment of liabilities, which was to precede the separation, it might be found, as between the counties themselves, a just and sensible arrangement to make, (and we should assume that it was,) that the county of Wellington, within which the road in question was, should assume the whole debt, and receive the benefit of all payments that had been made; in other words, have the same right to claim reimbursement from the townships liable to contribute to these payments as the united counties would have had. The municipal acts permitting such adjustment should receive such a construction as will give full effect to such arrangements, and we think we should look upon any technical rule of the common law against assignments of choses in action as impliedly abrogated by the legislature in such cases, if its application would defeat the object of the agreement made under the sanction of the statute. It is a rule which is in substance and effect to a great extent disregarded by courts both of law and equity.

In our opinion the county of Wellington, under the agreement set out, has a legal claim to sue for the whole.

But it is objected, thirdly, that they have not a right of action for any part of the demand against the township of Wilmot, for that that township is liable only to the county of Waterloo, of which it forms a part, and that the claim of the county of Wellington is against the county of Waterloo, which should be made to pay the money and collect it from the townships in the eighth clause.

We think that objection was well answered in the argument. The county of Waterloo could not be held liable, without making a part of it liable, (namely, North Dumfries,) which it is clear from the provisions in the eighth clause of 14 & 15 Vic., ch. 5, was to be exempt from contributing, (In re The Municipality of North Dumfries and the Municipal Council of Waterloo, 12 U. C. R. 507.)

On the whole we think this action is free from legal difficulties, and that it is the clearest and most convenient remedy for enforcing the liability imposed upon the townships men-

tioned in the eighth clause. It gives to the municipalities of those townships a fair opportunity of having any defence which they may desire to make deliberately considered and decided upon, and if they are found liable, the means given by the statute 12 Vic., ch. 81, sec. 179, of levying the amount of the execution that may issue on the judgment by assessment with the aid of the sheriff, is reasonable and sufficient.

Then as to the amount for which a verdict could properly be rendered upon the evidence.

It was admitted on the argument that there was such an error committed in the calculation as the defendants complained of, a portion of the plaintiff's claim being twice allowed. That of course must be struck out.

But, on the other hand, interest that was disallowed should, as we have already stated, be added to the verdict.

Then an objection has been taken to the plaintiffs' right to recover in respect of any sum which, when they brought this action, was merely due and payable, but not actually paid.

At present we think when any part of the debt had fallen due, for a certain portion of which the statute has made those townships "*responsible*," the plaintiffs, as being clearly bound to pay the money, can sue the townships for it which, as we apprehend at present, were not intended to be made directly liable to the creditors.

The plaintiffs require to be prepared to meet the several payments, and might have no funds at command out of which they could advance them.

In ordinary cases the municipalities which are liable for a debt can take measures for raising by assessment on other municipalities which are liable for the same debt the sums which they are bound to contribute, and there is the same reason why the plaintiffs should be allowed in this case to collect the sum in order to enable them to make the payment which is due.

If the plaintiffs were suing only under a common count for money paid, they could only recover for what they had really paid; but on the special count in the declaration

their action rests on a more favourable footing, and in reason the county should be allowed to save its own rate-payers and its own funds from the necessity of paying a sum which it is the duty of the defendants to pay, and to pay in time.

- The being liable to others for what the defendants are bound to pay to them is sufficient in our opinion to entitle the plaintiffs to sue. The debt in this case is created by a statute between the parties, and is due. It is not an ordinary question of repayment of money advanced for another.

In many cases a party is allowed to recover from another money which such other ought to have paid to a third party, and against which he had engaged to indemnify, though by reason of his default a claim only has been established against the party who should have been held harmless, and has not yet actually paid the money.

It was said, we think, on the argument, that there was only one payment to which this question applies—that is, for money due, but not actually paid by the county now suing—and that even that has been paid since this action was brought. It is not a reasonable objection certainly if this is so, since it would only render another action necessary without saving the costs of this.

We have considered whether we should hold that nothing more was meant by the eighth clause than that the townships named in it were to continue liable (that is, as the clause says, in other words, to be “responsible”) in the same manner as if they would have been if they had continued to form part of the same municipality which issued the debentures.

The object, however, was not that, we think, but in positive terms to make them debtors, for upon the other construction we do not see how the provision could be conveniently carried out. The county of Wellington has now no jurisdiction over those townships.

It does not appear from the facts stated, and not denied, that the rate-payers of the township of Wilmot can have contributed, through their assessments, any part of the money paid for the road debt, by the counties of Wellington and Grey united, or by Wellington alone; so that we do

not find any pretence for objecting that if this action succeeds the defendants will have to pay twice.

The statute 12 Vic., ch. 78, sec. 15, under which the county of Wellington made its agreement with the county of Grey when they were about to dissolve the union, allowed them to enter into an agreement "for the adjustment and settlement of the proportion, if any, of any debt due by such union, and which it might be just that such junior county," (in this case Grey) "on its being disunited from such union, should take upon itself, with the time or times of payment thereof." And the act expressly provides that "every such agreement so entered into, shall, both *in law and equity, be and continue to be binding upon such junior county*, and upon the county or counties, from which it shall be disunited." Now there is no doubt that, although the county of Wellington, as the senior county, was and is liable to the holders of the debentures for all the money borrowed for the purpose of this road, yet Grey, which had a part in contracting the debt was also liable; and it became necessary, therefore, under the act, that when they separated they should make provision for setting what proportion of their different debts the junior counties should contribute after the separation.

This they could easily settle by amicable arrangement, on a view of all circumstances, though in the absence of any agreement it might be very difficult to settle it upon any principle of computation.

The Guelph and Dundas Road, for which the debt in question had been contracted, lay none of it within the county of Grey; and it seemed just to both of the counties, it appears, that Wellington should continue liable for the whole debt, and that Grey, after its separation, should not be bound to pay any of it; in other words, that that debt should be treated as if it had been from the first the sole debt of Wellington. But if that were to be the future position of Wellington in regard to this debt, it seems to have been thought reasonable by both counties that in regard to those payments which had been made before the counties separated, and in respect of which, if they had continued

united, the two counties would have had a claim against the townships named in the eighth clause of 14 & 15 Vic., ch. 5, such a claim should (as a part of the agreement) become thenceforward a claim of the county of Wellington alone, in consideration of its having assumed the whole outstanding debt ; in other words, the county of Grey relinquished its interest in the payments made by the united counties. Now, if we carry into effect only that part of the agreement which relieves the county of Grey from liability, and hold ourselves disabled from carrying into effect the other part of the agreement, which makes the townships named in the eighth clause debtors to the county of Wellington alone in respect to the advances which had been made, then we do not give effect to the agreement of the parties, as we treat that as not binding in law which the statute says shall be binding both in law and equity. We leave the county of Wellington to pay all the debt, and yet leave the county of Grey in possession of part of the assets which, under the agreement, were to have gone to the county of Wellington.

We think we are to carry the statute into effect really and substantially, by giving it a more liberal construction, and making it supply the place of that assent of the debtor which is necessary in ordinary cases to perfect the assignment of a debt, so as to enable the person who comes in the place of the original creditor to sue in his own name. And indeed we do not see how otherwise the matter could be managed, for the municipal councils of the two counties which are now separate could not join in suing, and we do not see how they could sue separately for any certain portion of the money.

We think that the plaintiffs' rule for adding the small items for interest, which were disallowed at the trial, should be made absolute: that the defendants' rule should be made absolute, (as consented to) so far as respects the striking out in each case the sum twice charged through mistake of the witness; and that the remainder of the defendants' rule should be discharged. The same judgment is given in each case.

WILKES V. HEATON.

Evidence—Calling witness after case closed.

Where after the close of the plaintiff's case he is allowed to examine the defendant, this does not re-open the matter so as to *entitle* him to call other witnesses.

INTERPLEADER ISSUE, to try whether certain goods seized by the sheriff of Brant upon a *fi. fa.* in favor of this defendant Heaton against one Taft, were, on the 13th of October the goods of this plaintiff Wilkes.

At the trial at Brantford, before *Hagarty, J.*, after the close of the plaintiff's case, and after a motion for nonsuit had been made, the learned judge allowed the plaintiff to call the defendant as a witness. Another witness, Mr. George Wilkes, whose name had been mentioned during the progress of the trial, but who was not then in court, came in during the examination of the defendant, and the plaintiff's counsel then claimed a right to call him also, on the ground that the case had been re-opened. The learned judge, however, refused to receive his evidence, and a verdict was found for defendant.

M. C. Cameron moved for a new trial, on the law and evidence, and for the rejection of evidence, and on affidavits.

Freeman, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We cannot say that it was not entirely in the discretion of the learned judge at the trial, when he allowed the plaintiff, after he had closed his case, to call the defendant, who was at the time in court, to decline to extend the indulgence further. The learned counsel for the plaintiff put in upon the footing of strict right, that because Mr. George Wilkes happened to come into court, when the plaintiff, if he wished to call him, should have had him in attendance at the proper time, he should be then allowed to put him in the box.

No doubt the judge could have done so if he thought fit, but it was by no means a matter of course that he should, for it very frequently happens that when a witness has been looked for in vain, or has unexpectedly left the court, the judge will not delay for him an indefinite time, but will say to the party, "if he comes in before the jury retire we will

hear him ;" but if the witness comes in and is examined after the case of the party who desired his evidence has been closed, it is not assumed in such cases that the party can, without leave of the court, go on calling other witnesses as if he had not before closed his case.

But though we take this view, we might readily grant a new trial, if we did not see that the justice of the case could not by any means require it. Independently of the fact that a large portion of the property in question has by the mortgage which the plaintiff gave back to Taft become the property of the latter, and not of the plaintiff, the whole complexion is such, that no person of ordinary understanding can come to any other conclusion than that the assignment to the plaintiff was a mere colourable contrivance to protect the property of those who made it.

Rule discharged.

ANDERSON V. GRACE AND BEAL.

Notice of action—Division Court—Want of seal to warrant.

The provisions as to notice of action in 13 & 14 Vic., ch. 53, sec. 107, are repealed by the 14 & 15 Vic., ch. 54.

Bailiffs of a division court are entitled to notice of an action for seizing goods, although acting under a warrant without seal.

TRESPASS, for taking three waggons, and other goods of the plaintiff's.

Pleas.—1. Not guilty, by statute 13 & 14 Vic., ch. 53, sec. 107. 2. The goods not the plaintiff's.

At the trial, at Simcoe, before *Hagarty*, J., as to great part of the things, the plaintiff's case was that his father had sold them to him in July, 1857, for £75, which he paid at the time in part, and the remainder since.

The defendants were bailiffs of a division court, and took the goods under a warrant of execution from that court, at the suit of one Baker against the plaintiff's father.

The warrant was directed to Grace, one of the defendants, as bailiff of the second division court of the county of Norfolk. The other defendant, Beal, was also a bailiff.

The warrant had no seal to it, and had no appearance of having been sealed.

The defendants' counsel moved for a nonsuit at the trial, because no notice of action had been served.

The plaintiff's counsel contended that the provision in 13 & 14 Vic., ch. 53, sec. 107, as to giving notice, was directory only; and that the defendants in this case were acting under an execution void for want of a seal.

Leave was reserved to move for a nonsuit, for want of notice of action; and the jury found for the plaintiff £55 damages.

The defendants acted together in seizing the things, and one witness swore that he was present, and heard the plaintiff tell the defendants to seize two of the waggons in question, and told them where they were.

McMichael obtained a rule *nisi*, pursuant to leave reserved, or for a new trial; to which *M. C. Cameron* shewed cause.

ROBINSON, C. J.—I think the nonsuit should be ordered, for want of proof by the plaintiff of notice of action being served on the defendants, as required by statute 14 & 15 Vic., ch. 54.

It is that act that must govern, and not the statutory protection afforded in cases of particular officers by any prior act, as in this case by 13 & 14 Vic., ch. 53, sec. 107, because such previous enactments giving protection are repealed by the later act. And under the 14 & 15 Vic., ch. 54, the want of notice may be insisted on, as any other defence may, under the plea of not guilty by statute. Section 5 of that act expressly provides that it may.

The protection, I think, applies to the constable Beal acting in aid of the other, and although the warrant had not a seal (if it had not). No doubt the warrant ought to have been under the seal of the court; but that only shews, that it this had not a seal when it was acted upon, the defendants could not have justified under it; they might still have believed that they were acting in the discharge of their duty as bailiffs.

MCLEAN, J.—That the defendants supposed they were in the discharge of their duty as bailiffs there can be no doubt

from the evidence, and their acting under such a belief is quite sufficient to have entitled them to the protection of the statute. If notice had been given they might have tendered amends before action brought, and thus have saved the costs of a suit. It is when any irregularity of proceeding, or any defect in authority exists, that a notice is most essential to a bailiff or other officer. No notice having been given to the defendants in this case the plaintiff cannot sustain his action, but if he could there certainly should be a new trial, as the evidence is strong in favour of the defendants.

BYRNS, J., concurred.

Rule absolute for nonsuit.

SIDDALL V. GIBSON ET AL.

Division court—Prohibition—13 & 14 Vic., ch. 53, sec. 23.

It is no ground for a writ of prohibition to a division court that the judge decided against law and good conscience, if he had jurisdiction in the case. The affidavit on which such writ is moved for should not be entitled in any court.

Semble, that a recovery should not be allowed in such court against an indorsee of a promissory note without proving either presentment or notice.

Simpson moved for a writ of prohibition to the judge of the County Court of the county of Lambton, and of the first Division Court of the said county, to restrain his proceeding in this case.

The case was tried on the 10th of August, 1858, and a verdict was rendered for the plaintiffs on a demand against John Gibson, one of the defendants, as endorser of a promissory note for \$40, payable in six months.

The complaint was that the plaintiff was suffered to recover when no evidence was given of presentment of the note or notice of non-payment. The defendant in court raised the objection. Judgment was entered on the 10th of August.

ROBINSON, C. J., delivered the judgment of the court.

The affidavit on which this motion was made should not have been entitled in any cause.

But, independently of this irregularity, we cannot properly grant the prohibition. There is no excess of jurisdiction.

It is not denied that the defendant indorsed the note, but on the return of the summons he attended, and objected that it was necessary to prove presentment and notice. The judge was then called on to consider whether the plaintiff could recover without giving such evidence, and he determined that he could, probably considering that under the 23rd clause of 13 & 14 Vic., ch. 53, he could determine that the defendant as indorser was in conscience liable upon the note, whether it had been presented and notice given or not. Undoubtedly in this court we could not so have determined ; but admitting that in determining as he did the judge determined wrong, both as regarded the law and the good conscience of the case, yet that is not a ground for prohibition when he had jurisdiction, as he certainly had here.

Though we think we should have insisted at least on evidence of presentment, yet we cannot interfere by prohibition consistently with the legal principles which govern this remedy, because the judge had jurisdiction to dispose of the case according to his ideas of law and good conscience.

We refer to *Toft v. Rayner*, 5 C. B. 162 ; *Ellis v. Watt*, 8 C. B. 615 ; and *Zohrab v. Smith*, 5 D. & L. 637.

We have been asked also to grant a *certiorari* to remove the case ; but under the 23rd clauses of the Division Court Act that lies only before judgment, and with a view to trial in the superior court.

Rule refused.

IN RE MCPHERSON AND BEEMAN.

Assessors—Appointment of --Quo Warranto.

The council by *resolution* appointed one B. assessor, who was sworn into office. and made an assessment. This appointment was made by a vote of three against two. The election of one of the three was afterwards set aside, and by a subsequent vote the resolution was rescinded, and a by-law passed appointing another assessor. Both made assessments, and much confusion arose.

Under these circumstances the court granted a *quo warranto* to determine the validity of the last appointment.

Read obtained a rule on defendant to shew cause why an information in the nature of *quo warranto* should not be exhibited against him, to shew by what authority he

claimed to be an assessor of the incorporated village of Napanee, in the county of Lennox and Addington, on the ground that he was not duly elected or appointed to the office of assessor; and that at the time of his pretended appointment the office was full, and no vacancy in the office of assessor for the said village had occurred by death or removal of residence of John Benson, the assessor theretofore appointed; and that the appointment of said Beeman was made at an irregular and unauthorised place of meeting of the council, and at a meeting not duly held or authorised.

The applicant swore that he was a resident freeholder of the village of Napanee, and reeve of the same.

On the 18th of January, 1858, Donald McPherson, and four other members of the council elected for 1858 for the village of Napanee, met and were organised and sworn into office. They then by resolution appointed Benson assessor for the municipality, and he was sworn into office, and gave security, and had made an assessment for the year. No by-law was passed appointing Benson. This appointment of the assessor, and the appointment of the other officers for the year, was made by the votes of Bartell, Martin, and the reeve; the other two members, Detlor and Miller, voting against all the appointments.

Bartell's election had been contested by Mr. Forward, who was afterwards adjudged to be entitled to be returned in place of Bartell, and took his seat on the 15th of March.

The meeting on that occasion was held at the usual place, being the council room in the market building; but a great crowd attending, it was alleged, it was moved by Detlor, seconded by Miller, that they should adjourn to the town hall. The reeve declined to put the question. Mr. Detlor then moved, seconded by Miller, that the by-law or resolutions appointing officers be rescinded, and a new by-law made appointing other officers for the current year. The reeve declined also to put that resolution, deciding that it was out of order, there being no vacancy in the offices by death, resignation, or removal.

Detlor, Miller, and Forward, then left the council, and went to the town hall. The reeve and Martin remained a short time, and then adjourned for want of a quorum.

Detlor, Miller, and Forward, then, in the town hall, proceeded to business, in the absence of the reeve and Martin. They there passed a resolution rescinding all the resolutions that had been passed appointing officers, including the appointment of Benson to be assessor ; and suspending their rules of proceeding, they passed a by-law appointing defendant Beeman to be assessor, who was sworn into office, and had made an assessment for the year. So there were two assessments made by these two persons, thus appointed, differing from each other, and much confusion and perplexity in consequence. This was the substance of the case on the part of McPherson, the relator.

The councillors who appointed Benson justified their conduct by stating that Bartell's seat being contested, they desired that all appointments to office should be suspended till it should be determined whether he should retain his seat or Forward be returned instead ; but that they were over-ruled in this, and that afterwards, when Forward was seated they rescinded all the appointments and made others.

Adam Wilson, Q. C., shewed cause. *Read*, contra, cited *Cole on Quo Warr.* 177 ; *Rex v. Clark*, 1 East 38 ; *Rex. v. Morris*, 3 East 213.

The statutes referred to are noticed in the judgments.

ROBINSON, C. J.—There are several questions arising on these proceedings which require to be settled : *first*, as to whether Benson ever was legally appointed, being appointed by resolution only, and not by by-law, nor, as appears, under the corporate seal.

Then, if he was legally an officer, it is a question whether he could be removed by the council in March last at their pleasure, or for any reason that is shewn.

And whether Beeman has been regularly appointed, supposing that it was in the power of the council to remove Benson and appoint another assessor in March, is another question.

We should therefore grant the information, unless there is legal difficulty in the way, and we do not think there is any such difficulty. The office is one of a public nature. It

highly concerns the inhabitants of the municipality that the duties should be discharged by a person having legal authority to discharge them ; and when we find that there are two persons in the office, which can be filled by one only, and that the council are divided in opinion upon the question which of the two could legally act in making the assessment, it is fit that the legal right should be solemnly adjudged.

I think an information in the nature of *quo warranto* may go, in the case of such an officer, under the statute 9 Anne, ch. 20, and that it might go at common law.

BURNS, J.—The question involved in this application is an important one to have settled, for it appears by the facts disclosed in the affidavits that the safety and integrity of all the municipal institutions of the country are at stake if similar proceedings can be allowed, and if the defendant's appointment should be held to be legal, and I think would call for the interference of the legislature.

A seat of one of the members of the council was questioned, and proceedings were taken, the result of which was that he was unseated, and his opponent put in his place. While he held the seat, and was acting *de facto*, the assessor and other officers of the corporation were appointed to office, but when the opponent was seated that vote changed the majority which had appointed the village officers, and then they undo what had been done before. The ground for it is stated by themselves thus : "That whereas the right of Mr. Bartells to a seat as a member of this council has been a matter of dispute since the last elections, and the courts have decided that Mr. Forward was duly elected, and therefore entitled to the seat, and pending this decision Mr. Bartells has been sitting as a councillor ; and whereas certain resolutions have been passed naming certain persons as officers of this council, and such resolutions were adopted by and in consequence of the vote of Mr. Bartells, and against the remonstrances of two members, who alleged and urged that there was no necessity for such haste in the matter, as the former officers would according to law remain in office until superseded,

and it would be better and more seemly to defer the appointments until a decision was obtained as to the contested seat: be it therefore resolved that the several resolutions, &c., be rescinded, and such appointments cancelled."

The 28th section of 12 Vic., ch. 81, requires the councillors, *so soon as conveniently may* be after their own election, to appoint the assessor of the village. The reason for this is obvious, because, under the 24th section of 16 Vic., ch. 182, the assessor is required to complete his assessment between the 1st of February and not later than the 15th of April in each year. Waiting until it would be seen whether the court would declare the seat of some particular member vacant certainly would be no compliance with the act of parliament, that the appointment should be made as soon as convenient.

Again, it is a question raised whether the council, once having appointed an assessor, can cancel that appointment at their mere will and pleasure. They invoke to their aid as authority for it the 5th sub-section of section 31 of 12 Vic., ch. 81; but that section says they may appoint a sufficient number of pound-keepers, fence-viewers, overseers of highways, road surveyors, and of such and so many other officers as may be necessary for carrying into effect the provisions of the act, and in like manner displace all or any of them, and appoint others in their room. If this provision covered the appointment of the assessors and collectors there would have been no occasion for the 28th section at all but we see that whole section applies exclusively to those two offices, and only gives the council authority to make a new appointment within a year, when there shall be a vacancy by death or removal of residence from the municipality; and the vacancy is to be filled up at the next meeting of the council—that is, after the vacancy—or as soon as conveniently may be. If it were necessary to determine the matter finally now, I should say I had no hesitation in pronouncing that the legislature advisedly placed those two officers named upon a different footing from the other officers named in the 5th sub-section of section 31, for it can easily be seen to what utter confusion the pro-

ceedings of the municipality may be put by a wanton change of the assessors and collectors in the midst of their duties.

Besides this, the affidavits shew other things with respect to the manner in which the defendant had been appointed, and the other assessor was attempted to be removed, which might properly be animadverted upon; but as the rule should be made absolute for an information in the nature of a *quo warranto*, if the defendant thinks proper to defend the action, and thus place the proceedings upon record, it may be time then to speak of them. If the defendant does not, however, wish to contest the matter further, or take the formal opinion of the court upon the subject, he may enter a disclaimer to the office, upon being served with the writ.

MCLEAN, J., concurred.

Rule absolute.

HENRY V. THE COMMERCIAL BANK OF CANADA.

Several executions improperly enforced—Right to poundage on each—Attorney ordered to pay—9 Vic., ch. 56, construction of

Defendants, a banking company, carrying on business at different places in the province, were sued by the plaintiff on a contract, and at the assizes a verdict was taken subject to arbitration. An award was made in vacation giving a large sum to the plaintiff, for which he entered judgment and issued execution to the sheriff of Hastings. Defendants moved in chambers to stay proceedings until term, but the application was refused. The plaintiff's attorney then issued two other executions, to the sheriffs of Northumberland and Peterborough, and instructed proceedings to be continued on the first writ, the avowed object being to obtain the money before term, when defendants intended to move against the award. Defendants had an agency in each county, and all the writs being earnestly pressed, their books and papers, to the value of the debt and poundage, about £1200, were seized at the three places.

Held, there being no ground for apprehension of losing the debt, that the conduct of the attorney in issuing and enforcing the three writs was improper, and that his clients instructions could form no justification. The court therefore ordered him at once to refund to defendants the poundage retained by two of the sheriffs, and to pay the costs of the executions directed to them, and of this application.

Seemle, that under the facts, which are more fully set out below, these sheriffs were not strictly entitled to poundage.

Where money levied has to be restored to defendant, in consequence of something for which the plaintiff is answerable, the sheriff may recover his poundage from the plaintiff.

Quære, whether the same principle applies when the sheriff is entitled only to compensation for his service under 9 Vic., ch. 56, or whether defendant must pay in all such cases.

Draper, for the defendants, obtained a rule *nisi* on the plaintiff, on the sheriff of Peterborough and Victoria, the

sheriff of Northumberland and Durham, and Robert P. Jellett, Esquire, the plaintiff's attorney, to shew cause why they, or some one of them, should not refund to the defendants the several amounts of poundage levied by the sheriff respectively of the goods and moneys of the defendants, with the expenses of the two concurrent writs of execution issued in this suit to them, on the ground that when those writs were issued the sheriff of Hastings had made of the goods of the defendants the debt and costs in full ; and because the plaintiff and his attorney knew thereof at the time the said two writs were issued ; and because the sheriff of the county of Hastings made the first seizure, and completed his levy first, and received his poundage in full ; and because the defendants had paid three several amounts of poundage to the three sheriffs severally, while only one amount was due ; or why it should not be referred to the master to ascertain how much poundage and fees were to be paid by the defendants to the said two first mentioned sheriffs respectively.

The plaintiff had brought an action against the defendants upon an alleged contract. At the assizes the cause was referred to arbitration, and a verdict taken by consent, subject to an award to be made. The arbitrators awarded a considerable sum of money to the plaintiff. This took place in the vacation between Hilary and Easter terms last.

The plaintiff entered up judgment for the sum awarded ; and on the 31st of March, 1858, took out a *fi. fa.* against goods, directed to the sheriff of the county of Hastings.

The defendants complaining that the reference to arbitration was concurred in by their attorney without their authority, and contrary to their instructions, and insisting that the plaintiff had no cause of action against them, applied to a judge in chambers to stay proceedings upon the judgment and execution until the following term, when they could move against the award. After several enlargements of the summons at the request of parties, it was at length discharged a few days before the term, the judge in chambers seeing no good ground of objection to the award.

The term (Easter) began on the 17th of May. On the

13th of May the plaintiff's attorney took out two other *fi. fas.* against goods, directed to the sheriff of Northumberland and Durham, and to the sheriff of Peterborough and Victoria. These were received by the former sheriff on the 13th of May, and by the latter on the 14th of May. On the 13th of May also the plaintiff's attorney instructed the sheriff of Hastings, whose proceedings on the *fi. fa.* taken out in March had been suspended by the summons issued on defendants' application, to delay no longer. And all these writs of execution against defendants' goods were earnestly pressed by the plaintiff's attorney at the same time.

The defendants had a bank agency in each of the jurisdictions—that is, at Belleville, Cobourg, and Peterbrough—at which they were carrying on their business of banking; and in consequence of the manner in which the plaintiff's attorney pressed his executions, each of the sheriffs, without delay, seized books, papers, and bills of the bank, sufficient in value, as they supposed, to cover the execution and fees, including poundage on the whole debt, on each levy, being upwards in all of £1150 in each case, besides interest.

The plaintiff's attorney insisted with them all that they must have the money before the next term, and the plaintiff himself was not less urgent with the sheriff of Hastings, avowing his object to be to make the money before the term, or otherwise he might fail in getting it at all, meaning, as was supposed, that the application against the award might then be made, and might be successful.

Being thus pressed, the sheriff of Hastings, on the 13th of May, seized all the bank books in the defendants' office in Belleville, and office furniture, and proposed to leave them in possession of the agent, as usual, upon his giving satisfactory security that they should be forthcoming when required. The plaintiff enquired whether the deputy sheriff had demanded the money from the agent, and was told that he had, and that the agent had refused to pay it, until the defendants had an opportunity, as they desired, of moving against the award in term, when, if they could not get relief, they would pay.

The deputy sheriff of Hastings swore that on the 15th of

May he informed the plaintiff's attorney that he had made the money on the writ, to which he answered that he did not care now, as he had got the money in two places already, namely, Peterborough and Port Hope, and had paid it over to the plaintiff.

On the 21st of May the sheriff of Hastings was still in possession of the money, and had no instructions from the plaintiff's attorney.

The poundage and fees of the sheriff of Hastings amounted to £40 3s. 3d.

R. N. Jones made affidavit, on the 25th of May, 1858, that he was informed by the plaintiff, Henry, that if the sheriff of Hastings did not make the money by the 17th of May (first day of term) he thought he should not get it at all, as defendants would then move to set aside the award; and he appeared to think they would be successful.

The bank agent at Belleville, Mr. Thompson, swore that on the 24th of April the plaintiff's attorney told him that he was aware, when he took up the suit, that the plaintiff had no ground of action, and that he told the plaintiff so, but recommended him to let it go on and have the cause entered for trial, when he thought he could get it referred to arbitration, and that something might be made of it.

Mr. Thompson made another and further affidavit, in which he swore that the deputy sheriff seized, on the 13th of May, all the books of the bank, without which they could not carry on their business, but must submit to almost any payment rather than have them removed: that he told the deputy sheriff so, who at once consented to take security for their being forthcoming: that he had fully informed the plaintiff's attorney that the bank intended to move in term against the award, and shewed him a letter from the bank to him to that effect: that he, the attorney, nevertheless informed him that he would press the execution; and he seemed then to have paid the money, for he annexed an insolent letter from the plaintiff to him, which shewed that he had then got the money.

The sheriff of Northumberland and Durham received the execution directed to him on the 13th of May, from the plaintiff in person. On the 14th he levied under it £1,250,

and on the 15th of May paid the plaintiff's attorney the full amount of debt and costs, and took his receipt for it, retaining for the sheriff's fees and poundage £28 10s., and paying back a surplus to the bank agent.

The sheriff swore that the plaintiff, on the 13th of May, instructed him to proceed at once, and make the money: that on the 14th of May he went to the defendants' agency office at Port Hope, and seized notes of the bank, and the full amount of the execution and of his poundage and fees: that on the 15th of May, in the forenoon, he paid to the plaintiff's attorney, who was then in Cobourg with the plaintiff, the full amount for which the execution was indorsed, and took his receipt for it, which he exhibited with his order to discharge the *fi. fa.*, on being satisfied his costs.

The teller of the branch bank at Port Hope swore that on the 14th of May the sheriff came to the branch bank office there, and seized a large amount of bank notes, promissory notes, and other securities belonging to the defendants, under the *fi. fa.* at the plaintiff's suit: that the manager of the branch bank being from home, he telegraphed to the cashier of the head office for instructions, and received for a reply that the sheriff of Hastings had already seized enough to cover the judgment, and that the sheriff of Northumberland must be notified that the bank would prosecute him if he touched any thing, and would indemnify him against any action of the plaintiff, Henry. They stated further that they were moving to set the judgment aside; that the sheriff, being informed of this, refused to receive indemnity and stay proceedings, but took away 5,000 dollars of the moneys of the bank, though the teller protested against it.

The deputy sheriff of Peterborough and Victoria stated that he received the *fi. fa.* directed to him on the 14th of May from the plaintiff himself, with instructions to make the money at once; and he received similar instructions by letter from the plaintiff's attorney: that he received on the same day two telegraph messages from the attorney that the money was not made at Belleville: that the plaintiff insisted

personally with him that he should make the money, and have it ready to pay over to him at the latest on the 15th of May.

The defendants' bank agent at Peterborough swore that the plaintiff and deputy sheriff came to his office on the 14th of May, and seized the safe in his vault, which contained at the time £2,000 in bank notes and specie, and took away the keys: that the deputy sheriff kept possession of the office and keys, and all business was thereby suspended: that at half past one on that day he served a written notice on the sheriff, informing him that the defendants' property had been already seized at Belleville, and that he must abandon the seizure he had made, the same being irregular and illegal, or that the bank would hold him responsible in damages, and offering the sheriff at the same time any reasonable indemnity for doing as he was required by the notice: that the seizure was not abandoned, but the deputy sheriff kept the keys of the safe, though fully informed of the injury it would occasion: that in an hour or two afterwards the sheriff gave up the keys to him, on his assurance that he would not remove the money: that on the 15th of May the sheriff came and opened the safe and took away £1,200 of bank notes of the defendants' bank.

This was corroborated by the affidavit of a clerk in the bank, who swore, further, that after the safe with the money in it was seized, the plaintiff brought a blacksmith and an assistant with tools to break open the safe: that the deponent remonstrated, and the person told him that he would not break open the safe unless the sheriff desired him to do it. He swore that the business of the bank agency was suspended during that day (14th of May).

The sheriff swore that, on receiving the £1,200 spoken of by the bank agent, he paid about £800 to the plaintiff, retaining the balance to pay over to the plaintiff's attorney, according to instructions received from him: that he afterwards received notice from the plaintiff's attorney that the amount of the execution had been made at Cobourg, and that he had better get back from the plaintiff what he had paid him: that he did so, and returned the £1,200 to the

bank agent, less his fees, which, including poundage, amounted to £29 17s. 6d.

In answer the plaintiff's attorney made an affidavit, that after the summons to stay the execution till term had been set aside, the plaintiff came to him and insisted on getting his money at once, having been so long delayed ; that on the 13th of May he instructed the deputy sheriff at Belleville to proceed on the writ : that he told him what he had seized, but that he could not get the money : that the main object was to get the money before the next Monday (the 17th of May, the first day of term), when the plaintiff expected further delay, trouble, and expense : that writs were sent to Cobourg and Peterborough because the plaintiff feared that in one or other place the funds would be locked up : that he acted under express instructions from his client : that on the 14th of May he received a message from Cobourg that the sheriff had the money there : that he then telegraphed that to the sheriff at Peterborough, but not that the money was made in Belleville : that on the morning of the 15th of May he received a check from the sheriff of Northumberland for the amount of execution, and on the same day told the deputy sheriff of Hastings that he had done so : that when he did learn that the sheriff of Belleville had also made the money, he told him at once to refund it, which was on Saturday, the 15th : that under the circumstances he considered the plaintiff justified in pursuing the course he did, and therefore issued the concurrant writs. He referred to Mr. Thompson's affidavit, and stated that he might have said to him "*that he thought the plaintiff had no cause of action at law*, but said nothing to warrant him in inferring that he was scheming to extort money, and that for another ;" and he added, that the conversation was private, and his remarks were not intended to supply the defendant with an affidavit. He stated that the two additional writs issued on the 13th of May were issued only in consequence of the urgency of the matter, to avoid delay and expense : that on the 14th of May, when the sheriff of Peterborough swore that he sent him a message by telegraph that the money was made at Belleville, he sent two tele-

graphs to his deputy that the money had not been made at Belleville, and did so in consequence of a message from the plaintiff at Peterborough that the defendants' agent said the money had been made at Belleville.

Morphy shewed cause for the plaintiff, and his attorney, *Carroll*, for the sheriff of Peterborough. *Armour* for the sheriff of Northumberland and Durham.—*Rex. v. Bowles*, Wightw. 116; *Rex v. Caldwell*, 1 Anstr. 279; *Rex v. Fry*, 2 Anstr. 358; *Rex v. Barber*, 3 Anstr. 717; *Lewis v. Morris*, 2 Cr. & M. 712; *Sewell on Sheriffs*, 475; *Ch. Arch. Prac.* 552; *Collingridge v. Paxton*, 11 C. B. 688; 29 Eliz. ch. 4; 43 Geo. IV., ch. 1; 49 Geo. III., ch. 4; 2 Geo. IV., ch. 1, sec. 19; 9 Vic., ch. 56; *Morris v. Boulton*, 2 Chamb. Rep. 60.

ROBINSON, C. J.—It appears that the three sheriffs among them have levied upon the defendants, under several execution for the same debt, £98 10s. 9d., for poundage; that is to say, the sheriff of Hastings, £40 3s. 3d.; the sheriff of Northumberland £28 10s., and the sheriff of Peterborough £29 17s. 6d., each of which sums, as we understand the case, includes a charge for poundage upon the whole sum to be levied, and the larger charge of the sheriff of Hastings, being occasioned probably by his having made a seizure in March, and incurred some expense in consequence between that time and the time he received the money. No explanation has been given of this.

The money levied by the sheriff of Northumberland seems to have been retained in payment of the debt and costs, and the moneys levied by the other two sheriffs is not stated to have passed into the hands of the plaintiff's attorney, and we suppose has been returned to the defendants by the sheriff of Hastings as well as by the sheriff of Peterborough.

The sheriff of Peterborough, it is stated, did receive his back, and returned it to the defendants, deducting thereout his poundage and fees. He had in the first place, however, paid £800 into the plaintiffs hands (which he got back) retaining the balance—between £300 and £400—to be paid over to the attorney himself, according to his express instructions.

This is a feature in the case of which no explanation is offered, and which may very naturally have given rise to injurious surmises, considering the general complexion of the case, and the extraordinary measures adopted both by the plaintiff and his attorney.

As to any legal questions involved, we take it to be quite clear that only one poundage can be made upon one debt out of the defendants' goods, under our statute 2 Geo. IV., ch. 1, sec. 19, and most unquestionably not more poundages than one because several sheriffs had been so recklessly and unnecessarily set to work as they were in this case to make the same debt.

The statute 9 Vic., ch. 56, allows compensation for the services actually rendered by sheriffs when executions have gone into several districts, and some one or more of the sheriffs have rendered services in obedience to the writ, but have not sold the property seized, nor actually levied the money, in consequence of satisfaction having been otherwise obtained.

In this case the money made by the sheriffs of Hastings and Peterborough being, as we infer from the affidavits, returned to the defendants, it cannot, we think, be treated as levied within the spirit and meaning of the act, so as to give them a claim under anything in that statute to actual poundage, and there was no sale made of anything seized.

If under that act what had been done by the sheriffs of Peterborough and Hastings entitled them to poundage, which we think it does not, or if their services were to be recompensed by an allowance made by the court under the act 9 Vic., ch. 56, and not by poundage, it would be a question in either case whether the poundage, in the one case, or the special fee for services, in the other, is to be received by the sheriff from the plaintiff in the suit or from the defendants.

The case of *Rawstorne v. Wilkinson et al.* (4 M. & Sel. 250) is an authority to shew that, notwithstanding the English statute 43 Geo. III., ch. 46, sec. 5, which, like our statute 2 Geo. IV., ch. 1, allows poundage to be levied upon the defendant, yet when the money levied has, in conse-

quence of something for which the plaintiff is to answer, to be restored to the defendant, the sheriff may sustain an action for his poundage against the plaintiff who procured him to render the service.

Whether the same principle can be acted upon in a case like the present, or whether the statute 9 Vic., ch. 56, must be taken to mean, what is not expressed in it, that the compensation for double services rendered in such cases under a plurality of writs may be charged against the defendant, is a point upon which I do not at present feel clear, though I have always hitherto supposed that the latter course is what the statute contemplates. We have never, that I remember, had occasion to consider this ; and upon the view which we take of this case we need not determine it here.

The proceedings which the plaintiff and his attorney adopted in this case were most oppressive and unreasonable, and in the case of the attorney exceedingly unbecoming. He appears to think it a sufficient reason to give for the part he took in it, that his client insisted upon it ; but surely it is the proper duty of an attorney to restrain his client from abusing the process of the court. He is not at liberty to concur with him in such measures.

Both the attorney and his client well knew that the Commercial Bank was a large banking establishment, doing an extensive business throughout the province, and that any person having an execution against them for a debt much larger than the debt in question could have no difficulty in collecting it. It was not because the plaintiff could have believed his debt to be in danger that he acted in the strange and indeed violent manner that he did.

That is not pretended in any affidavit placed before us but it is quite plain, and is in terms acknowledged by the plaintiff's attorney, that his object was to get the money before the term, which was near, should arrive, in order that the defendants might not have the opportunity of making an application to the court against the award.

What could be more unjust and oppressive than the idea of making the defendant pay a treble poundage on the debt, in consequence of the extraordinary measures taken

by the plaintiff for the express purpose of shutting out the defendants from timely access to a court of justice. It is not stated when the award was made, but we suppose it must have been in the interval between Hilary and Easter terms, for if before Hilary Term, the defendants would have had an opportunity of moving in that term. Then, if made in the vacation, when a verdict had been taken by consent, it would have been the ordinary course to wait till the term before entering judgment upon it, in order that the party against whom the award was made might have an opportunity of moving against it, if he desired on any ground to do so.

But judgment being entered before term, and execution issued, the defendants could only go before a judge in Chambers with any objections that they might have to urge. On what ground they did move, or what were the terms of the submission, we are not informed; but though the learned judge to whom the defendants applied felt himself not at liberty to interfere on any ground that was before him, the *defendants* might still be sincerely under the impression that they had a case which would be favourably entertained on a discussion before the full court, and the plaintiff and his attorney were both evidently aware that the defendants did desire such an opportunity.

If nothing more had been done than to press the execution, notwithstanding, in the ordinary manner, after the discharge of the judge's summons had left the plaintiff at liberty to proceed with his execution, the case would not have called for remark; but the proceedings that were adopted were unusual, and so unreasonable as to be almost incredible.

It would be a great reflection upon a court if they allowed the expense of such proceedings to fall upon the defendants.

The several sheriffs were not to blame, for they each had the responsibility thrown upon them of enforcing at their peril the writs placed in their hands; and the plaintiff and his attorney, in their resolution to realise the money between the 13th and 17th of May—in other words, at latest on Saturday, the 15th—were most urgent in pressing the

several sheriffs, travelling themselves from place to place, and sending telegraphic messages, with an activity and earnestness that can only be accounted for by believing that there really was an impression on the minds of both that there was something in the nature of the demand under the award which would prevent its being enforced at all, if the facts could be got fully before the court. They could not have believed the debt in danger, and four days' delay was surely nothing uncommon, for when goods are to be sold under a *fi. fa.* a delay of eight days at least is the ordinary course.

We consider that we are bound to take care that the defendants get back the two sums that were obtained from the sheriffs of Northumberland and Peterborough by the proceedings that were so unnecessarily and wantonly adopted. If there was any thing excessive in the £43 3s. 6d. retained by the sheriff of Hastings, that is not complained of in this application, and could at any time be remedied.

As to the sheriffs of Northumberland and Durham, and of Peterborough and Victoria, they were compelled by the plaintiff and his attorney to render services such as would be followed by a legal claim for poundage in the case of enforcing a single execution, and we do not think we are called upon to deprive them of any part of it under the circumstances; but our order is, that the rule be made absolute upon the plaintiff's attorney to refund to the defendants the several amounts retained by the sheriffs of Peterborough and Hastings for poundage respectively upon the writs of execution to them severally directed, and that he shall also pay the expenses of the two concurrent writs of execution issued in this suit in May last, together with the costs of this application; and we recommend that the attorney pay prompt attention to this order.

MCLEAN, J.—By the 2 Geo. IV., ch. 1, sec. 19, a sheriff is authorised to levy poundage, fees and expenses, on an execution against the person, lands or goods of a debtor, over and above the debt and interest recovered; but to restrain the levying of poundage in several counties or dis-

tricts, the 9 Vic., ch. 56, sec. 3, provides, that where no money shall be actually levied no poundage shall be allowed, but the court or a judge may allow a reasonable charge for any service rendered. It is quite clear that poundage cannot properly be levied in three several counties on the collection of the same sum of money ; but by the express directions, of the plaintiff and his attorney the money on the plaintiff's execution has been actually levied by three several sheriffs, and each of them has retained his poundage and fees, claiming a right to do so on the ground of having each made the money on the execution directed to him.

It is not necessary to enquire how far that claim is well founded in this case. It is, I think, evident from all the affidavits, and appears clearly from Mr. Jellett's own affidavit, that his object, and that of the plaintiff, in issuing three executions, was to ensure the collection in one of the counties before the first day of term, in order to prevent an application to the court to set aside the award and the judgment founded on it.

It was not from any apprehension of insufficiency of goods in either of the counties that a *fi. fa.* was issued into the others, for the parties were fully aware that the first seizure at Belleville would be certain to realise the full amount of the execution; but a delay might arise in that county, which might enable the defendants to bring all the circumstances before the court in term, and to prevent that, and in the hope of seizing money under the 22nd section of the Common Law Procedure Act of 1857, executions were issued into two other counties. The issuing of these concurrent executions not being for the legitimate purpose contemplated by law, but for a purpose unjustifiable in itself, that of depriving the defendants of an opportunity of seeking relief against an award and judgment which they considered unjust and illegal, was in fact an abuse of the process of the court ; and if the affidavits which have been filed to support this application are to be credited, there is too much reason to believe that the plaintiff's attorney was aware that the plaintiff's claim was of a doubtful nature, if not wholly unfounded, and that he therefore adopted the course which he took to

prevent its being brought before the court. The defendants, by the unnecessary and vexatious proceedings of the plaintiff and his attorney, have not only been compelled to pay a large amount on an execution in a suit which they consider to be unjust, but they have been obliged to submit to the payment of three several poundages, when under any circumstances they ought not to have been subjected to such a charge in more than one county.

It is not, perhaps, surprising that the plaintiff should desire to enforce the payment of a large sum of money for which he had by some means obtained a judgment, but it certainly was no part of the duty of Mr. Jellett to assist him in collecting any sum to which he was not entitled, or in evading the fullest investigation into the nature and the justice of his demand, by such a course as he thought proper to pursue.

There is no doubt that Mr. Jellett, as an attorney and officer of this court, is liable to be called upon to answer for any misconduct which he may be guilty of as such. It is laid down in Com. Dig. Title, "Attorney," B. 13, that "an attorney, being an officer of the court, if he attempts anything which he cannot or ought not to do, it will be a contempt of the court, for which an attachment shall go against him;" and it is also established that the court may order an attorney to pay costs to his own client for neglect, or to the opposite party for vexatious and improper conduct. 2 Burr. 654; Hullock's Costs, 492, &c.; 4 T. R. 371; 3 Taun. 492; 1 Salk. 87. I regret that the affidavits in this case shew too clearly that the conduct of Mr. Jellett has been very vexatious and improper, and I think that if he is required to refund to the defendants the amount of poundage which they have been obliged to disburse unnecessarily, and to pay the costs of this application, the measure of punishment will still be far from severe. I concur, therefore, in ordering that he do repay to the defendants the sums retained by the sheriffs of the counties of Hastings, and Peterborough and Victoria, and that he do also pay the costs of this application, and of the several writs unnecessarily and improperly issued after the first seizure was made.

BURNS, J., concurred.

Rule discharged.

MCINTYRE V. THE GREAT WESTERN RAILWAY COMPANY.

6 Geo. IV., ch. 7, sec. 13—Sale of lands for taxes—Measurement of part sold
—Inconsistent descriptions.

The lot in question, fronting to the north, was bounded on the south by the river Thames. The sheriff, while the 6 Geo. IV., ch. 7, was in force, sold 120 acres of the lot for taxes, and in his deed first gave a description by metes and bounds, which was not in accordance with the statute, and then added a general description of the land, as being 120 acres, measured in the manner prescribed by the act.

Held, that the latter description must govern.

Held, also, that according to the statute the rear line of the tract sold should correspond with the rear of the whole lot, following the windings of the river.

TRESPASS, *quære clausum fregit*, to lot No. 4 in the third concession of North Dorchester, describing by metes and bounds four acres and $\frac{16}{100}$ of the lot, as the part trespassed upon, charging destruction of the grass, subverting the soil, &c., and taking down and conveying away the fences; and laying as special damage that defendants, by constructing their railway, encumbered the plaintiff's close and prevented him from having the use of it, and of a certain highway adjoining his lands, to which access had been cut off by defendants' railway; all which the plaintiff averred was done without his leave, and without making him any remuneration.

The second count was for use of the plaintiff's land with his permission.

The third count for the value of land sold by the plaintiff to defendants.

The fourth count stated that the plaintiff, before the constructing by defendants of their railway, had access from the said land to a certain highway adjacent to it: that defendants, without the plaintiff's consent took for their railway from the plaintiff's lot four acres and $\frac{16}{100}$, described in the first count, running across the plaintiff's said lot of land, near the southerly end thereof, and adjoining the said highway, whereby the plaintiff was deprived of the four acres and $\frac{16}{100}$ of his land, and of access to the said highway: that this was done without the plaintiff's consent, and without defendants being authorised by virtue of any reference to arbitration under the statute, and without the plaintiff's receiving any remuneration: that the plaintiff had been

always willing to appoint an arbitrator according to the statute, and did appoint one, and gave notice to the defendants, and required them to appoint an arbitrator on their part, as it was their duty to do, but that defendants neglected and refused to do so.

And the plaintiff sued for a writ of *mandamus* (under the Common Law Procedure Act) to the defendants, to appoint an arbitrator to award upon the amount of damage, &c., for taking the plaintiff's land, and for depriving him of access to the highway.

Pleas, to the first and fourth counts, "Not guilty," by statutes 4 Wm. IV., ch. 29, sec. 26, 16 Vic., ch. 99, sec. 10, 18 Vic., ch. 176, sec. 26; and to the second and third counts, Not indebted.

Whether the plaintiff's portion of lot No. 4 did or did not in fact extend to the highway towards the south end of the lot was one of the questions made at the trial, which took place at London, before *Robinson*, C. J. If it did not, then, as the railway could not be said to cut off his access to the highway, one of the claims to damages advanced by him could not be well founded. That question turned upon these facts :

In June, 1834, part of this lot No. 4 in the 3rd concession of North Dorchester having been sold for taxes to Samuel Street, Esq., a deed was made by the sheriff, in which the land was thus described : "Commencing at the north-west angle of said lot, and running conformably to the courses and proportions of said lot, south $21^{\circ} 30'$ east, nearly 37 chains, 88 links, more or less, to the south-west angle of the said parcel or tract of land so sold as aforesaid; then running the several courses by which the said lot is bounded by the river Thames 29 chains, 80 links, more or less, to the south-east angle of the said parcel or tract; then north $21^{\circ} 30'$ west, nearly 42 chains, 88 links, more or less, to the front thereof; and then south $68^{\circ} 30'$ west, nearly 29 chains, 75 links, to the said south-west angle; and may be particularly known as follows—that is to say : beginning at the front angle of the said lot, &c., on that side from whence the lots are numbered, and measuring backwards, taking a

proportion of the width corresponding in quantity with the proportion of this particular lot in regard to its length and breadth, according to the quantity required, comprising 120 acres aforesaid."

The whole lot was bounded towards the south by the river Thames, which not running in a right line past the lot, but dipping towards the south from the centre of the lot to the south-eastern angle, gave rise to a question what should be the figure of the 120 acres of the lot which was sold for taxes, in order to conform to the direction of the statute 6 Geo. IV., ch. 7, sec. 13, which was then in force, though afterwards modified by the statute 7 Wm. IV., ch. 19, sec. 5.

Surveyors were examined, and requested to state how they would proceed in such a case to carry out the provisions of the statute.

It was agreed at the trial that the jury should assess—
1st. The value of the land of the plaintiff taken for the railway. 2ndly. The value of the land of the plaintiff south of the railway, if there should be found to be any so situated. 3rdly. The damage to the plaintiff from his being cut off by the railway from the highway called the Governor's road, provided it should appear that the 120 acres sold to Mr. Street for taxes, and by Mr. Street sold and conveyed to this plaintiff, extended to the highway, for otherwise he had not the right of access to the road of which he complained he had been deprived; and whether the plaintiff's land did extend to the highway depended upon the questions—1st. What did the sheriff's deed convey? 2ndly. What could it legally convey according to the statute 6 Geo. IV., ch. 7, sec. 13?

The jury found that if no part of the 120 acres owned by the plaintiff came to the highway referred to, its value would be £8 per acre (*i. e.*, the four acres and $\frac{16}{100}$ taken by defendants). That if it did at any point touch the highway, so that the plaintiff could, but for the railway, have had continued access to the highway, the four acres would be worth £30 more than the £8 per acre; and that the damage to the plaintiff of being without a crossing over the railway to the highway, if he was entitled to go to the highway, would be £5.

On this finding it was agreed that a verdict should be taken for the plaintiff for 1s. damages, with leave reserved to the court to direct a verdict to be entered for defendants, or for the plaintiff, according to the actual damages found by the jury, as the right of either party might appear to the court upon the evidence.

Becher, Q. C., for defendants, moved to have the verdict set aside, and for a new trial, on the ground that the plaintiff had no title to the land, the value of which he claimed, and upon the discovery of new evidence as stated in affidavit.

Wilson, Q. C., for the plaintiff, obtained a cross rule to have the verdict entered for such damages as the plaintiff might appear to the court to be entitled to according to the special finding of the jury. Both rules were argued together.

It was contended, on the one side, that the sheriff was bound to lay out the track so that the 120 acres would constitute a figure of the same kind and proportions as the whole of the broken lot No. 4; that is, having its southern line correspond with the curvature of the river on the southern limit of the lot.

On the other hand, it was suggested that a right line should be drawn from the south-east to the south-west angle of the lot, on the river, at the water's edge, and that the southern limit of the 120 acres should correspond with that; or that the 120 acres should be laid out in a regular parallelogram, the rear boundary corresponding in course with the front; or that the mean length of the two side-lines of the lot should be taken, and a line run through from east to west at that distance from the front, and parallel with the front line.

ROBINSON, C. J.—The sale of this land for taxes was made while such sales were governed by the statute 6 Geo. IV., ch. 7, sec. 13, in regard to the manner in which the sheriff should take out of the lot any number of acres less than the whole, for which the highest bidder at the sale should offer to pay the taxes and fees.

The method prescribed by the act was "to begin at the

front angle of the lot, on that side from whence the lots are numbered, and measure backward, taking a proportion of the width, corresponding in quantity with the proportion of the particular lot in regard to its length and breadth, according to the quantity required to make the sum demanded."

If it happened in this case that the sheriff had disregarded this provision, and had conveyed to the highest bidder 120 acres of the lot apportioned upon a different principle, and constituting a figure differing from the figure of the whole lot, then the question would have been whether the deed should be held void on account of such deviation from the statute. But we have no such question here, for the sheriff very properly did make his deed so as to conform closely to the act, and we cannot hold that to be erroneous. Such, at least, I hold to be the effect of the deed. It contains a kind of double description : the one, intended to express what the supposed length of the side lines must be, in order to give the 120 acres in the manner pointed out by the statute ; and the other, keeping clear of any mention of distances, for fear they might mislead, and stating that the land conveyed was 120 acres, to be taken out of the whole lot, so as to constitute a figure of the same proportions as the whole lot. If these descriptions conflicted with each other, we should have to adopt that which literally complies with the statute, and discard the other, because the one would be legal and right, and the other erroneous ; but they do not conflict, because the said lines in the detailed description have not a certain length absolutely given to them, but the words "*more or less*" are added, and the whole description given in the deed amounts to this :— that the grantee is to have 120 acres measured out of the lot as the statute directs, and which, as the sheriff has estimated, will give to the several limits of the tract the dispensation which he specifies, or about that. There can be no conflict between the two. The standard by which to measure is given in the deed in the terms of the statute, and the real length remains to be ascertained by applying the rule.

Seeing then now exactly what was conveyed, my opinion is that the statute has been in literal terms complied with,

by making the rear line of the 120 acres correspond in its courses with the rear line of the lot ; and we have no authority to prefer to that any one of the courses suggested by the witnesses. They might have been as good, or better, according to the circumstances, but we cannot say that the statute sanctions them.

If the rule laid down in the act were one that *could not* be applied under the circumstances of this case, then there would be room for considering what would be the most reasonable approximation ; but it *can* be applied, and according to the deed it is to be applied, for the deed passes no land that will not be embraced under a description so framed, which latter consideration is decisive as to what the plaintiff can claim.

The parties at the trial stated that they would have no difficulty in settling the verdict after the court had determined the principles of survey that was to be applied, and we withhold final judgment in this case till the same can be stated, keeping the case open for that purpose. It may then turn out that the defendants have taken none of the plaintiff's land ; but a careful measurement will show how that is, and there will be no difficulty in adjusting the verdict after the facts are ascertained on the ground.

MCLEAN, J.—The court being relieved from the consideration of any question of damages, the only point to be considered is the description necessary to ascertain the particular boundaries. It is clear that the specific metes and bounds mentioned in the sheriff's deed cannot govern, as the distances are stated uncertainly, being more or less, whereas by law the quantity of land must be confined to 120 acres, and the courses must correspond with the several lines which form the limits of the lot. The length and breadth must be according to and in proportion to the length and breadth of the lot. The general description given in the sheriff's deed corresponds with the requirements of the 13th section of 6 Geo. IV., ch. 7, by which the sale of lands for taxes were regulated till the passing of the act 7 Wm. IV., ch. 19, the 5th section of which authorises in all future sales

the sheriff, at his option, to put up and adjudge to the purchaser of any part of a lot, such part of the lot as he may in his discretion think best for the interest of the proprietor.

Whether the plaintiff's land, when run parallel to the several limits of the lot, will extend to or beyond the railway, must of course depend upon accurate measurement.

At present the courses marked upon the plans produced deviate so much from the courses of the lines intended in the original survey to form the boundaries of the whole lot, that it is impossible to say that they are correct, or that the plaintiff is entitled to claim any damages.

BURNS, J.—The point made by the defendants, that the particular description by metes and bounds contained in the sheriff's deed should govern, and that the land should be taken out of the whole lot according to that, because the sheriff may have thought it more advantageous to the proprietor that it should be so, cannot prevail, for the statute authorising the sheriff to do so is 7 Wm. IV., ch. 19, passed three years after the conveyance in question was executed. We must then take the statute 6 Geo. IV., ch. 7, for our guide. The deed from the sheriff, besides professing to convey 120 acres by metes and bounds, which are rather indefinite, goes on to say, "*and may be particularly known as follows, that is to say, beginning at the front angle of the said lot,*" and then follows the precise language of the 13th section of the acts. I suppose, in giving the previous description, it was thought the directions contained in the act were followed, but it is plain that it is not so, for instead of taking a proportionate width of the lot according to its length, the sheriff by the description would profess to convey very nearly the whole width of the lot, both in front and in rear. The lot appears to be about 30 chains, 62 links wide, and the sheriff's description of the 120 acres makes that portion to be 29 chains, 75 links in width, thus leaving a strip on the side of the lot less than a chain wide, and it would be some 42 chains and 88 links in length. The sheriff had no discretion to adopt any other method than that prescribed to him by the act, and as we see that, though he did pre-

tend to describe the 120 acres by metes and bounds, he did so to meet the requirements of the act, we have nothing left for us to do than to carry out that description according to survey, whatever that may be.

This brings me to the consideration of the case as applied to the proper construction of the act of parliament. The lot in question is a broken lot, with the river Thames forming its rear boundary, and the west side of the lot longer than the east side. The plaintiff's surveyor, as well as the defendants' surveyor, have both taken 23 chains, 91 links as the proper proportion of the width of the whole lot to give to the 120 acres sold for the taxes, but where the two disagree is in the length. The surveyor for the plaintiff has taken a proportion of the shorter as well as the longer side of the lot, making a straight line across the lot, and not a curved one according to the windings of the river, and that line he has determined by taking the point on the river as the east side of the lot and the point where the west side of the lot intersects the river, and drawing a straight line between the two, and then making the rear boundary of the 120 acres parallel to that line. The defendants' surveyor has added the length of the shorter side to the length of the longer side, and then taking the mean of the two, by which to estimate the length of the 120 acres. The simple question is, which of these two methods most conforms to the statute. I am clearly of opinion the defendants' method does not at all conform to the statute. That survey might answer very well in a broken lot of the description of the lot in question, but would not apply in a case where the shorter side would not contain a sufficient length to make the quantity of land required, and could not be made to apply at all to a lot which had only three sides. In this case, as in all cases before the statute 7 Wm. IV., ch. 19, we must adopt a method in which the statute will apply to every description of lot. By adopting the proportion of the long as well as the short side, with the line in front of the lot as well as the rear, we then have a rule which will govern every case, no matter what the shape of the lot may be. This method will make the piece sold out of the whole tract

always be of the same shape exactly with the original tract. It is very true that in some cases a small piece so sold under the 6 Geo. IV., might be of a very ludicrous shape, but we must suppose the legislature considered that it was better to have a fixed rule than leave it uncertain, though three years after they did depart from that so far as giving the sheriff a discretion how to allot the land sold, when he thought it would be advantageous to the proprietor to do so.

We are not called upon in this action to say whether in fact the survey made by the surveyors for the plaintiff may not be less favourable to him than it might have been, by reason of the windings and turnings of the river, but it is sufficient, for the purpose of determining his right to recover from the defendants, to say that his survey conforms most to the construction which I think should be put upon the act of parliament. This survey would bring the plaintiff's land in respect of the west side of his land, down to the road he contends he should have had access to, but for the fact of the railway cutting him off from it, and this fact is not denied on the part of the defendants.

CRAWFORD V. BROWN.

Assignments—Construction of—Account books—Schedule filled up after execution—Replevin.

N. & Co., by deed, assigned to M. all and singular the "furniture," &c., "and effects of them, the said N. & Co., and which will be more particularly mentioned and described in the schedule to these presents hereafter to be annexed, marked A., and all other their personal estate and effects whatsoever and wheresoever situated." The schedule was not filled up at the time of executing or filing the assignment, but was afterwards filled up by a third person without reference to the assignors, and the books in question were mentioned in it, but remained in their possession.

Afterwards N. & Co., by another deed, assigned to the plaintiff all the debts owing to them, giving him power to examine and take extracts from their accounts for the purpose of making up and adjusting such debts properly. The books were handed to the plaintiff by N. & Co., in pursuance of this deed, and having been taken from him by defendant he replevied. Defendant set up M.'s right.

Held, that the plaintiff was entitled to recover, for the schedule to the first assignment, filled up as it was, could have no effect, and the books did not pass under the operative words.

This was an action of replevin brought to recover certain books of account which had belonged to Messrs. Nixon & Swales.

Defendant pleaded, 1. *Non cepit*. 2. That the books claimed were the property of one William Paterson MacLaren, and not of the plaintiff.

It was agreed that a verdict should be taken for the plaintiff, subject to the opinion of the court on the following facts.

First.—On the 24th of October, 1856, Nixon & Swales made an assignment, a copy whereof is hereto annexed. The copy hereto annexed is a copy of the copy registered in the office of the clerk of the county court of the county of Wentworth, registered as being a copy of the original assignment, and no other copy has been registered; and is a copy of the original assignment and schedules thereto attached, as such schedules were at the date of the execution of the said assignment and of the registration aforesaid.

Secondly.—Subsequently to the registration of said copy of said assignment, schedule A. to said original assignment annexed, but which is not and never has been annexed to the copy registered, was filled up at the foot of schedule A. after the assignment to the plaintiff hereinafter mentioned: the said schedule having been filled up by a person who had no communication with Nixon & Swales or the plaintiff before filling up the same, but thought he had a right to do so under the terms of the deed.

Thirdly.—Notwithstanding such assignment, the said books of account always thereafter remained in possession of Nixon & Swales until the 11th of December, 1856.

Fourthly.—On the 11th of December, 1856, Nixon & Swales executed an assignment to the plaintiff, a copy of which is hereto annexed, and thereunder on the same day delivered to the plaintiff the books in question; and the plaintiff continued to hold the same until the 13th of December, 1856, when the defendant, as agent for said William P. MacLaren, took them from the plaintiff without his authority or consent.

By the assignment of the 24th of October, 1856, after certain recitals, which it is immaterial to mention, Messrs. Nixon & Swales assigned to the said W. P. MacLaren certain vessels thereinbefore mentioned, with their appurtenances, “and also all and singular the horses, carts, carriages, waggons, household furniture and effects of them, the said

parties of the first part, and each and every of them, and which will be more particularly mentioned and described in the schedule to these presents hereafter to be annexed marked A., and all other their personal estate and effects whatsoever and wheresoever situate, save and except their lease of the city wharf and premises."

Schedule A. annexed to the copy filed, was left blank, but as filled up in the manner hereinbefore mentioned it included the account books in question.

By the assignment of the 11th of December, 1856, the same parties assigned to the plaintiff "all debts, and sum and sums of money due and owing by the various persons and firms respectively mentioned in the schedule hereto annexed, unto the said parties of the first part, and also all other debts and moneys owing to them by any other person or persons, and all the estate, right, title, interest, claim and demand whatsoever of the said parties of the first part of, in, to and out of the said debts and sums of money so due and owing to them by said parties and firms so mentioned in said annexed schedule as aforesaid, and all other the aforesaid debts and moneys, and every of the same."

After setting out the trusts, for the benefit of creditors, this power was added, "And for the purposes aforesaid the said parties of the first part do hereby empower the said party of the second part, his executors, or administrators, to examine all or any of their books of account, and take extracts therefrom, so as that the debts so due by the said persons and firms mentioned in said annexed schedule may be properly and correctly made up and adjusted, with full power also to the said party of the second part to compound in his discretion for any bad or doubtful debt, and to do everything requiring to be done in the premises fully and effectually." The question was, whether the account books passed under the first assignment, or whether the plaintiff, claiming under the second, was entitled to them.

Read, for the plaintiff, cited *Hudson v. Revett*, 5 Bing. 368, 384; *Weeks v. Maillardet*, 14 East 568; *Hibblewhite v. McMorine*, 6 M. & W. 200; *Powell v. Duff*, 3 Camp. 181; *Farish v. McKay*, 5 U. C. R. 462.

Burton, contra, cited *Ringer v. Cann*, 3 M. & W. 343.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff claims certain account books of the alleged value of £10, in which he says the accounts and transactions of business of Messrs. Nixon & Swales formerly were entered, and he charges the defendant with having wrongfully taken them away.

The defendant, besides denying that he took the books of the plaintiff as complained of, pleaded that they were the property of William P. MacLaren, and not of the plaintiff.

It is a question between two assignments ; the one dated the 24th of October, 1826, by virtue of which it is contended by the defendant the books became the property of MacLaren ; and the other, dated the 11th of December, 1856, under which the plaintiff claims them as his.

It has been conceded by the defendant that nothing can be claimed as having passed by virtue of the specification in the schedule A. annexed to the first deed, considering the time and circumstances of its being filled up and annexed ; but he claims that the books of account, &c., in question passed under the operative words of the assignment itself, which was made to MacLaren by Nixon & Co., on the 24th of October.

We are of opinion that they did not pass under the words "their personal estate and effects whatsoever and wheresoever situate," and that the defendant therefore had no right to take them as by command of MacLaren, if he had alleged in his plea that he did so take them, which he does not.

His second plea, therefore, is only to be looked at as negating the title of the plaintiff Crawford to sue ; but Crawford, it is admitted, took the books by delivery from Nixon & Co., the owners of them, and for a purpose which the assignment to him, made on the 11th of December, accounts for and explains.

His peaceable possession by delivery from the owner was sufficient to entitle him to this action, and the verdict for the plaintiff must therefore stand.

Judgment for plaintiff.

PATTERSON V. MORRISON

Malicious arrest—Production of writ—Notice to produce—Affidavit and manner of service.

In an action for malicious arrest it is necessary to produce or prove the writ in order to connect defendant with the act.

An affidavit of service of notice to produce is not admissible under C. L. P. A., sec. 167, unless made by the plaintiff's attorney or his clerk.

Quære, whether service of such notice on a female servant at the office and residence of defendant's attorney is sufficient.

Action for maliciously holding the plaintiff to bail for £273, having no cause for believing that he was immediately about to leave Upper Canada with intent, &c.

Plea.—"Not guilty."

At the trial, at Woodstock, before *Hagarty*, J., the plaintiff called the deputy sheriff, who swore that he had returned the writ in this case after the arrest to the plaintiff's attorney Mr. Cahill.

Notice to produce the writ and warrant was served on Mr. Cahill, by delivering the same to a female servant at his office and residence in Hamilton on the 23rd of February: the affidavit of service was sworn on the 24th. It was not stated that the affidavit of service was made by the attorney in the cause (*i. e.*, for the plaintiff) or his clerk.

The learned judge held that production of the writ was necessary, as without it there was nothing to connect this defendant with the arrest complained of. He thought also that the affidavit was not sufficient proof of service of notice under the 167th clause of the Common Law Procedure Act, not being made by the plaintiff's attorney or his clerk; and moreover, that the service made on the servant woman was not sufficient.

The plaintiff therefore took a nonsuit, with leave to move.

Duggan obtained a rule *nisi* accordingly, to which *Carroll* shewed cause, citing *James v. Mills*, 4 U. C. R. 366.

ROBINSON, C. J., delivered the judgment of the court.

We are all of opinion that the production of the writ was indispensable, for without that there was nothing in the evidence to connect the defendant with the arrest. Then secondary evidence of the writ became necessary, because

the original could not be found ; but it was necessary, in order to let in that, to shew that notice to produce the writ had been served upon the defendant.

This was not proved by producing any person who had served such notice, but the plaintiff attempted to avail himself of the provision in the 167th clause of the Common Law Procedure Act of 1856, which allows an affidavit of service made in writing to be received, provided it is the affidavit of the attorney or his clerk. This was not such an affidavit, and was therefore not admissable under the statute, and was necessarily rejected.

As there was no proof of the service that it is said was made, it is unnecessary to discuss whether the service alleged, but not proved to have been made, upon a female servant at the office and residence of the defendant's attorney, was sufficient, upon which point there are contradictory authorities.

Rule discharged.

CORRIGAL ET AL. V. BOULTON.

Bond—Plea of time given to surety—Demurrer.

Declaration against defendant on a bond conditioned for the payment of money by one R. *Plea*, that defendant was surety for R., as the plaintiff well knew : that the time for payment had elapsed ; and that the plaintiff, without the knowledge or consent of defendant agreed with R. to give him time for one year, in consideration of certain usurious interest paid by him.
Held, on demurrer, plea clearly no defence.

Declaration.—"That the defendant by his bond became bound unto the plaintiffs in the sum of £200, conditioned for the payment of £100 on the 30th of June, 1856, by one Thomas Roberts, which the said Thomas Roberts did not pay, and that the same is still unpaid."

Plea.—"That the defendant became bound, as in the declaration mentioned, as the surety for the said Roberts ; and that the said bond is subject to the express condition, that if the said Roberts should well and truly pay the sum of £100 to the plaintiff one year after the date of the said bond, according to the tenor of a certain mortgage bearing even date therewith, made by said Roberts to the plaintiffs,

then the said obligation should be void : that the plaintiffs received and accepted the said bond from the defendants as such surety for said Roberts, and that they well knew that the defendant had executed the same in that capacity, and they, the plaintiffs, expressly assented thereto when the same was delivered to them : that the time for paying the said mortgage debt has long since elapsed, and that the plaintiffs did, to wit, on the 1st of July, 1856, agree with the said Roberts, without the knowledge or consent of the defendant, so being such party as aforesaid, that they should forbear and give time to the said Roberts until the expiration of, to wit, one year thereafter, in consideration of certain usurious interest paid for such forbearance by the said Roberts to the plaintiffs ; and so the defendant says that he became and was and is discharged from the said obligation by reason of the premises."

Demurrer.—The material objections taken sufficiently appear in the judgment.

C. S. Patterson, for the demurrer, cited *Pooley v. Haradine*, 7 E. & B. 431 ; *S. C.* 3 Jur. N. S. 488 ; *Davey v. Prendergrass*, 5 B. & Al. 187 ; *Strong v. Foster*, 17 C. B. 201, 219 ; *Ford v. Beech*, 11 Q. B. 852 ; *Durand v. Stevenson*, 5 U. C. R. 336 ; *Moss v. Hall*, 5 Ex. 46 ; *Fraser v. Jordan*, 3 Jur. N. S. 1054.

Read, contra.

ROBINSON, C. J., delivered the judgment of the court.

The plea demurred to is no defence. The case of *Davey v. Prendergrass* (5 B. & Al. 187) is decisive against it. Nothing but an agreement under seal to give time to the principal, and thus in effect altering the day of payment, before there had been a breach of the condition, could have the effect of discharging the defendant from his obligation.

This plea does not state that delay was agreed to be given till after default, when the right of action against this defendant had accrued, and according to the statements in the plea we must infer it to have been after default that any agreement of the kind was made. Then, even if it had been stated that the agreement to give time to

the principal was made before the day of payment had arrived, yet the plea would be insufficient for not stating that such agreement was under seal, for without that it could not be binding, even if the action were against the principal himself to whom time was agreed to be given. There are other defects in the plea which it is immaterial to notice.

Judgment for the plaintiffs on demurrer.

IN RE THE SCHOOL TRUSTEES OF COLLINGWOOD AND THE MUNICIPALITY OF COLLINGWOOD.

Mandamus to levy rate for schools—Demand and refusal.

Mandamus to a municipality to levy a rate for school purposes refused, because the demand and refusal of a *certain sum* was not sufficiently shewn. *Quære*, however, whether a mandamus would lie in such a case, the trustees having power themselves to raise the money.

Boomer applied for a *mandamus* to compel the municipality to levy a rate for school purposes for 1858.

The facts are stated in the judgment of the court, delivered by

ROBINSON, C. J.—The affidavits shew that the school trustees in March last called upon the municipality to issue debentures for £1,000, currency, redeemable in twenty years, at six per cent., in order to borrow money for meeting an estimate submitted to the municipality of moneys required for school purposes, and to provide a sinking fund.

Afterwards the trustees changed their minds, and requested the municipality not to act upon their requisition.

Further circumstances then took place, and it appears to us, as the result of what has occurred, that besides the fact that a *mandamus* cannot be said to be a necessary remedy in any such case, because the statute gives to the trustees themselves power to raise the money, there has not been an explicit call upon the municipality to raise a *certain sum* as remaining yet to be supplied after the payments which the trustees have made to teachers, and limiting the requisition

to such amount as the trustees have resolved to insist upon, after changing their first resolution on the subject.

They should have specified a certain sum as being now required, and on refusal to provide that sum they would be in a condition to apply, subject to the question whether they cannot raise the money by exercising the powers which the statute gives to themselves as the trustees; and if so, whether the *mandamus* should nevertheless go.

OSBORNE ET AL. V. KERR.

Sheriff's sale—Description of land advertised inconsistent with land sold—Effect of advertisement—Assignment by debtor between the sale and conveyance—What interest in a lease may be sold by sheriff.

The sheriff under a *fi. fa.* against one Simpson advertised for sale all his right, title and interest, in and to a certain unexpired lease of the premises now occupied by John Kemp as a livery stable, on Main street, between James and Hughson streets (Main street ran east and west, James and Hughson streets north and south). At the time of the advertisement Kemp was no longer living on any part of the land so leased, but he had occupied a piece of about thirty feet frontage, out of eighty feet which the lease covered. At the sale, as the weight of evidence shewed and the jury found, the sheriff sold all Simpson's interest in the lease, it being his impression that it covered eighty feet, and that Kemp was in possession of the whole. A few days afterwards, finding that there was a dispute as to what had been sold, the sheriff advertised another sale of all the remaining interest of S. in the lease; but, having taken advice, he abandoned this sale, and afterwards conveyed to defendant, the purchaser at the sale, all the term of S. in the premises mentioned in the lease. In the mean time, however, S., assuming that only what Kemp was formerly in possession of had been or could be sold under the advertisement, conveyed to the defendant all the land mentioned in the lease, except that; and the plaintiff brought trespass against defendant, who claimed the whole of the land leased under the sheriff's sale and conveyance. The jury found for defendant.

Held, that it was properly left to the jury, on evidence of what took place at the sale, to say what land was actually sold: that it was the sale, not the advertisement, which must govern; and that the second advertisement could have no legal effect.

If the advertisement had clearly referred only to what Kemp was then occupying (which it was held not to do), but the sheriff had put up and sold the whole interest under the lease, the lease, and not the advertisement, would still have governed; for the sheriff's advertisement cannot be treated as an auctioneer's printed terms of sale in ordinary transactions. His power to convey depends upon what the debtor owns and what he actually sells, not on the accuracy of his advertisement.

Held, also, that it was immaterial that the sheriff's deed was not made until after the debtor had assigned to the plaintiffs, it being part of the execution. The sheriff under a *fi. fa.* may sell what the termor continues to hold under the lease, but he cannot sell a part of his interest, or a part of the premises.

TRESPASS, *quare clausum fregit*, and for pulling down a fence, and expelling the plaintiffs from a piece of land in Hamilton.

Pleas.—1. Not guilty. 2. The close not the plaintiffs'. 3. That the premises belonged to one George H. Taylor, who demised to one Jonathan Simpson for a term of years not yet expired : that the sheriff of Wentworth, under certain writs of *fi. fa.* against the goods of Simpson, sold and conveyed the unexpired term of Simpson in the said close to the defendant, who thereupon entered and removed the fence, because it incumbered the ground.

Replication to third plea, that the sheriff did not seize, expose to sale, or sell the interest and title of Simpson in the said close, in manner and form, &c.

In the declaration the *locus in quo* was thus described : " Being all that parcel of land heretofore demised and leased by George H. Taylor to Jonathan Simpson, and situate in rear of the building on James street, in the said city of Hamilton, known as the Commercial Hotel, extending along Main street 80 feet, or thereabouts, to Mr. Stevens' lot, and running through the alley on the north side of said lot, excepting that portion of same heretofore demised and leased by said Jonathan Simpson to one John Kemp, having a frontage on said Main street of fifty feet or thereabouts, and extending same width through to said alley, and adjoining said Mr. Stevens' lot "

At the trial, at Hamilton, before *Hagarty, J.*, it was proved by several witnesses that what the sheriff, or rather his deputy, publicly put up to sale was all Simpson's interest under the lease : that in fact what the sheriff sold was the lease from Taylor to Simpson for twenty-one years, or rather all Simpson's interest under it in the premises thereby demised.

But in the printed advertisement of the sale, dated May, 1857, signed by the sheriff's bailiff, and under which the sale proceeded, the property sold was described as " all the right, title, and interest of Jonathan Simpson " (the defendant in the *fi. fas.*), " in and to a certain unexpired lease of the premises now occupied by John Kemp as a livery stable on Main street, between James and Hughson streets."

The sheriff himself was not present at the sale. It was conducted by his deputy, who being interrogated at the

sale by people present about the boundaries of what he was selling, declared that he knew nothing himself about the boundaries: that what he was selling was all the right, title, and interest of Simpson in the lease from Taylor—that he was selling the lease; and he swore it was his impression at the time that the lot covered a frontage of about eighty feet on Main street. Several other persons who were present swore that they were under the same impression.

A few days afterwards the sheriff found that there was a dispute as to the quantity of land that had been sold on that occasion by his deputy, it being contended, on the one hand, that nothing more was sold, or could be sold, consistently with the advertisement, than that part which Kemp was occupying at the time of the sale, or had been occupying; and, on the other hand, that all was sold which Simpson then held under Taylor's lease, or rather his interest under the lease in all that the lease covered, and not merely such part as Kemp was occupying or had occupied.

The sheriff at first thought it better to put an end to the doubt by having another public sale of any remaining interest which then might be in Simpson under the lease, and accordingly he put up, on the 30th of May, an advertisement of another sale to take place on the 8th of June, under the *fi. fas.*, of "all the remaining right, title, and interest, of the defendants, Jonathan Simpson and Thomas Simpson, in a certain lease of and concerning a certain property situate on Main street, in the said city of Hamilton, to be further described at the time of sale."

No such sale, however, took place, for the sheriff, having taken advice in the matter, thought it better not to act upon his intention of having a second sale, but to leave it to the parties to contest the legal effect of the sale which had taken place.

Simpson, the defendant in the *fi. fas.*, had taken a lease on the 13th of October, 1852, from George Taylor for twenty-one years, renewable for a further term of twenty-one years, of "all that parcel or tract of land situate in the rear of the building on James street, in the city of Hamilton, known as the Commercial Hotel, and now in the

tenure or occupation of the lessee or his undertenants, extending along Main street eighty feet, or thereabouts, to Mr. Stevens' lot, and running through to the alley."

The lessee, Simpson, made a lease in 1852 to Charles Norton, which expired, in February, 1857, of "all and singular those premises situate on the corner of Main and James streets, in the city of Hamilton, and known as the Commercial Hotel, together with the stable and driving-house on James street, and the yard in rear of the said hotel, and of premises at present occupied by one Smiley, and one Hughson, as far back as an imaginary line to be drawn from the south-west corner of Kemp's stable to Main street and the alley in the rear." And on 17th of June 1854, Simpson made a lease to Norton, to continue as long as the other lease to Norton, of "those certain premises, situate on Maine street, in Hamilton, and adjoining the Commercial Hotel, and being occupied up to that date by one John Kemp as a stable and dwelling house."

On the 24th of June, 1857, the sheriff executed a deed to Kerr, the defendant in this action, upon the sale under the *fi. fas.* made on the 20th of May preceding, Kerr being the highest bidder; and in this deed he conveyed to Kerr all the term of Jonathan Simpson in the premises on Main street held by him on lease from George Taylor.

On the 5th of June, 1857, between the sheriff's sale and the execution of this deed, Simpson (the defendant in the *fi. fas.*), either assuming that the small strip of land, thirty feet on Main street, had not been in fact put up and sold at the sheriff's sale on the 20th of May, or that it could not have been legally so sold, in consequence of the terms of the advertisements which preceded the sale not extending to any thing but what Kemp was then occupying, made a deed to the plaintiffs in this action, for a consideration of £150, conveying to them all his interest in the lands demised to him by George Taylor, "save and except that portion of the said lands theretofore leased by him to one John Kemp, which adjoins the land of Andrew Stevens, and has a frontage of about fifty feet on Main street, and extends the same width as the front back to the alley."

The defendant, claiming under the deed made to him by

the sheriff, entered upon the land now in question, in order to inclose it ; and the plaintiffs having notified him to desist, brought the present action of trespass, denying the defendant's right to come west of the forty-nine feet that had been occupied by Kemp, and claiming the piece of land in question under the deed made to them by Simpson on the 5th of June, 1857, which piece of land (that is, the thirty feet on Main street west of Kemp's,) Norton had occupied while he was tenant of the hotel.

It was admitted on the trial that at the time of the sheriff's sale, and of the advertisement on the 9th of May, Kemp no longer occupied the livery stable and premises on Main street, of which he had been in possession. They were then vacant.

Simpson was a witness on the trial, and he swore that the narrow strip of land in dispute had always been occupied as part of the premises held with Norton's hotel, the only fence between the hotel and Kemp being on the west limit of the forty-nine feet leased, as it appeared, by Simpson to Kemp: that he, Simpson, had owned the fee of the property west of the tract leased to him, by Taylor (including Norton's hotel), and had sold it to these plaintiffs.

This still left in his hands the seventy-nine or eighty feet for the term which had been demised to him by Taylor, while the plaintiff's title, independently of the assignment of Taylor's lease, which they took from Simpson after the sheriff's sale to the defendant on the 20th of May, 1858, was clearly limited to land between the eighty feet and James street—in other words, to lot No. 17 on Main street: the seventy-nine or eighty feet east of that, to Mr. Stevens' lot, composing lot No. 18 on Main street.

The question therefore was what the sheriff upon the evidence could be held to have sold ; whether only Simpson's interest in the forty-nine feet which Kemp had occupied, or Simpson's interest in all that his lease from Taylor embraced. If the former, then the plaintiffs were entitled to recover in this action ; if the latter, then the defendant must succeed.

The sheriff's sale was conducted, not on the premises, but in view of them, on the corner of a street opposite.

At the time of the sale the narrow piece of land in question was still occupied with the hotel, of which one Nelligan was then in possession, and was not separated by any fence.

The jury found for defendant.

Read obtained a rule *nisi* for a new trial, on the law and evidence, for misdirection, and for the reception of improper evidence.

Burton shewed cause, and cited *Doe Hughes v. Jones*, 9 M. & W. 372.

ROBINSON, C. J., delivered the judgment of the court.

There was much evidence given on the trial as to what the deputy sheriff did in fact expose to sale at the auction, and what the bystanders understood, or might have understood, they were bidding for. The testimony of almost all the witnesses, including the son in law of Simpson, the debtor, and to a certain extent also that of his son, and more especially the testimony of Mr. Sadleir and Mr. Patterson, well warranted, we think, the conclusion which the jury came to, that what the deputy sheriff did in fact sell, and what the defendant bid for and supposed he was buying, was the interest of Simpson under Taylor's lease to him, and that was understood to be eighty feet from Mr. Stevens' lot westward, and not merely forty-nine or fifty feet; though some of those attending, and perhaps the deputy sheriff himself, were under an erroneous impression that Kemp had occupied it all, and were not aware that part of the eighty feet had been allowed to be occupied with the hotel, and were outside of Kemp's fence.

If the fact had been otherwise, and if it could be said with truth that the bidders were under a mistake in regard to the extent of the property that was put up, and that the sheriff's deed afterwards given conveyed more than was understood by those present and bidding at the auction to have been exposed to sale, then it would be most unjust to the execution debtor that such a conveyance should stand. The court, upon a proper application, we have no doubt, would in any such case set the sale aside.

But the jury would have gone, as it appears to us, decidedly against the weight of evidence if they had found

this to be a case of that kind. The lease from Taylor to Simpson is what appears to have been in fact sold, or rather all Simpson's interests under it ; and though some who were present at the sale, but not all, were under the impression that Kemp was, or had been, in possession of all that the sheriff was then selling, yet they were not under the mistake of supposing that what was put up, and was being bid upon, was only fifty feet upon Main street and not eighty. It seems to have been well understood that it was eighty feet, and it is reasonable to suppose that the bidding was upon that understanding.

If it was, then no wrong has been done ; but it is still necessary to consider whether there are technical objections to the defendant's title.

The conduct of the sheriff in putting out the second advertisement, as if all had not been sold that Taylor's lease covered, has no material legal effect. He had not then seen his deputy since the sale, and on the first impression thought he would be taking the best course to have another sale, at which he might put up any remaining interest that Simpson might hold, and so preclude all question. That would have precluded all question, if the defendant Kerr had purchased at such second sale, but not otherwise. The sheriff was well advised, we think, in not acting on that intention, but leaving it open to the defendant to go without prejudice before a court and jury and assert his claim to the whole land, or at least to the term in it, under the first sale.

All must turn upon the question what the sheriff sold, not upon what he advertised ; for if he put up to sale all Simpson's interest under the lease, and that was rightly expressed and understood to be eighty feet on Main street, and if Kerr bid for it accordingly, he could never be made to stand to his bid, and to accept a conveyance of fifty feet only, because no more had been advertised. That would be as unjust towards him, as it would be unjust towards Simpson if the sheriff had made a conveyance of the whole to Kerr, when it was known to and understood by Kerr and the other bidders that he had put up and sold a portion of the eighty feet only, and not the whole.

Now, as to the advertisement ; if there was no misunderstanding—we mean no substantial misunderstanding—as to what the sheriff sold, but merely a mistake as to how part of the land had been occupied, the describing it erroneously in the advertisement could not be more fatal to the validity of the sale than the not advertising it at all; and where there is no uncertainty about what has been sold, an omission by the sheriff to advertise does not affect the purchaser's title, though where it may appear that injury to the debtor, or to the execution creditor, has arisen from it, there may be a good cause of action against the sheriff.

But yet the contents of the advertisement, and what was stated by the witnesses respecting it, was all proper to be considered by the jury as bearing upon the question of what was in fact put up and sold to the defendant. Taylor's lease that was spoken of was not in the sheriff's hands at the sale, and the bidders did not see it, but according to the evidence it was supposed to cover eighty feet along Main street from Mr. Stevens' lot, and back to the lane in rear ; and that was the truth of the case, and was just what it was material to know.

The printed advertisement was present, and the deputy sheriff read it more than once to the people who attended. If after reading it, and saying what he did say, there could be no other construction put upon his conduct than that he professed to be selling the forty-nine feet which Kemp had inclosed, and nothing more, and that he did in fact put up nothing more, then nothing more could have been knocked down, and nothing more could be held to have been sold ; and the conveyance afterwards given would have been a bad and invalid execution of the sheriff's power, which was only to convey what he sold.

But if the advertisement had been what the plaintiffs assume it to be, a notice of an intended sale of the land that Kemp was then occupying, and of nothing more, yet if the sheriff had at the sale clearly put up the whole interest under the lease, and there was a general understanding among those present as to the contents of the land, we are not prepared to determine that the lease was

not to govern but the advertisement. We think the contrary, for it would be a fallacy to treat the sheriff's advertisement of a sale as standing in the place of an auctioneer's printed terms of sale in ordinary transactions between buyer and seller, and to allow it on that account to prevail against the sheriff's deed. It was only a notice of what the sheriff was going to do, and this is not an action grounded upon the printed terms of sale, in order to charge either the buyer or seller as upon an executory contract.

If in advertising for sale a house, or a lot, the sheriff should in his notice describe it by a wrong number, but should at the sale sell the property intended to be sold, and make a proper conveyance of it, the purchaser would hold according to his deed and the sale made in fact. The sheriff's power to convey depends on what the debtor owns, and upon what the sheriff has actually sold, not upon the accuracy of the sheriff's advertisement ; and we will remark in passing that we do not consider that the 188th clause of the Common Law Procedure Act has any effect upon that question.

According to some of the evidence, the deputy sheriff professed to sell what was advertised, and nothing more. According to the weight of testimony, as the jury thought, and as we think on perusing it, including the testimony of the deputy sheriff himself, he sold distinctly and expressly Taylor's lease ; or, in other words, whatever Simpson held under it. It was for the jury to say what they were satisfied he did, and we do not think they did wrong in finding as they have done.

Besides, if we should hold, which we think we cannot, that we can only look at the advertisement in order to see what the sheriff could legally sell, it would not be easy to determine what it means. If we only look at these words in the advertisement, " the premises now occupied by John Kemp as a livery stable," &c., that would hardly include the cottage on Main street ; and yet the plaintiffs do not contend for such a construction. What the sheriff advertised, however, was " Simpson's interest in a certain *unexpired lease* of the premises now occupied by John Kemp as

a livery stable on Main street." The lease is particularly referred to, and it is the interest in that that is to be sold, though it is called a lease of the premises now occupied by John Kemp as a livery stable, which is a description inaccurate in two respects, for it was a lease of premises more extensive than those Kemp had occupied, and it makes no allusion to him or to his occupation ; and it was true only in this respect, that it was a lease of land, a part of which Kemp had occupied. It was inaccurate in this other respect, that in truth, according to the evidence given at the trial, none of the premises demised by Taylor were, at the time of the advertisement or sale, occupied by Kemp ; and if the sale were confined to what was advertised, and the description in the advertisement were to be construed literally, nothing could have passed, for the words "now occupied by John Kemp," were not applicable to any part of the land in question.

It was remarked in the argument for the defendant, that when the sheriff sells a leasehold under a *fi. fa.*, it is the lease, in other words the term, that he sells, and not the land leased, and that therefore, in support of the verdict, we must look at what the lease covered. We do meet with this dictum in the books, and it has been held that the sheriff cannot sell a part of the premises demised, but can only sell the debtor's interest in the lease. We believe that to be so, but with the qualification, that the sheriff may sell whatever the termor continues to hold under the lease, though it be only a part of the estate originally demised, but he cannot, it seems, sell a part of the interest which the termor holds under the lease, nor his interest in a part only of the premises which he holds under it.

But independant of any aid which the defendant can derive from the application of that principle to the present case, we think he was entitled to succeed on the issue raised upon his second plea, for that the jury were not wrong in finding that he, the sheriff, did sell the interest and title of Simpson in the *locus in quo*, which is sufficient to support his plea by giving him a title, since the conveyance is not denied.

The plaintiffs' rule, therefore, should, in our opinion, be discharged.

We think it is not material in this case that the sheriff's deed was not made till after the 5th of June, when Simpson assigned to the plaintiffs, for the making the deed was part of the execution, which is all one act.

Rule discharged.

GRANT V. WILSON ET AL.

Fixtures—Mill machinery—Mortgage—Removal for the purpose of repairs—Interpleader—Claimant must shew his right, though execution creditor has none

The execution debtor mortgaged a grist mill and premises to one B., and this mortgage was assigned to the claimant, but not until after the execution issued. Previous to the execution, however, the debtor had executed a second mortgage to the claimant direct. The machinery of the mill had been disconnected, and taken down to be altered and repaired, *with the intention of replacing it again*, and while thus lying in the mill and on the premises it was seized under an execution against the mortgagor.

Held, that the machinery, under the circumstances, could not be treated as chattels, and that the claimant was therefore entitled to recover.

The question on an interpleader issue is not whether the execution creditor had a right to seize the goods under his writ, but whether the plaintiff had such an interest in them as entitled him to resist the seizure.

Under the first mortgage in this case, therefore, the claimant could not have recovered, although the goods were not subject to execution, because it was not assigned to him until after the seizure; but, *held*, that the second mortgage, being made to him before, removed the difficulty.

INTERPLEADER ISSUE. The case was entered for trial at Belleville, before *Draper*, C. J., but no witnesses were examined. A mortgage was put in, dated 22nd of August, 1853, from George L. T. Bull to Thomas Bailey, assigned to the plaintiff on the 29th of July, 1857; and another mortgage, dated 13th of May, 1856, from George L. T. Bull to the plaintiff. (See Upper Canada Law Journal of November, 1857, page 202, where the application made for the interpleader issue is reported.)

It was agreed at the trial that the affidavits filed on obtaining the interpleader summons, before the learned Chief Justice of this court, except those of any parties whose evidence would not be admissible at the trial, should be referred to by the court: that a list of the goods seized should be put in; and that the court should take the mortgages and affidavits, and decide as in a special case, drawing such inferences as a jury might draw.

On the 17th of June, 1857, a *fi. fa.* against goods

on the judgment entered for these defendants in this case, for £ 173 14s. 6d., against George L. T. Bull and Samuel J. Bull, was put into the hands of the sheriff of the county of Hastings, under which he seized the machinery of a grist-mill, consisting of one pair of mill stones, one smut machine, a number of pullies, mill-shafts, ropes and wheels, and other parts of the machinery of a grist-mill, which at the time of such seizure was lying in a grist-mill, owned by George L. T. Bull, one of the defendants in the *fi. fa.* This machinery had all been erected and used in the grist-mill, but some time before the seizure, and before the writ came to the sheriff, it had been taken down by a person who was tenant of the mill under George L. T. Bull, and was disconnected with a view to having alterations and repairs made in it, and with the intention of replacing the same in the mill.

The machinery was lying in the mill and on the premises belonging to it, when it was seized by the sheriff, and preparations were then being made for the intended alterations and repairs. It was sworn that the principal value of the mill was in the machinery, without which the mill would be comparatively of little value, and that all the machinery that had been so taken down and had been seized by the sheriff upon the premises, was intended to be replaced in the mill.

It was sworn, on the part of the plaintiff, in the interpleader suit, Grant, that if the machinery seized should be sold by the sheriff under the execution the mill would be rendered useless, and that Grant, who held a mortgage upon the property to secure a large debt, would not be able to obtain satisfaction of his claim.

Bull, the owner of the mill, bought the land on which it stood from one Bailey, and on the 22nd of August, 1853, he gave a mortgage back to Bailey in fee to secure the payment of certain sums of money mentioned in it, the greater part of which money, but not all, had fallen due before this execution was placed in the sheriff's hands.

On the 29th of July, 1857, Bailey assigned this mortgage to Grant, the claimant in this interpleader case.

On the 13th of May, 1856, George L. T. Bull executed a

mortgage in fee to the claimant, Grant, of the same land, to secure a debt of £750, payable by instalments on days which would all elapse before July, 1857, and to secure also the re-payment of further advances proposed to be made by Grant and his partner to Bull.

Upon these facts, as set forth in the affidavits filed upon the application for the interpleader order and on shewing cause against it, and in the mortgages referred to, it was left to the court to determine whether the claimant, Grant, was or was not entitled to succeed upon the interpleader issue, the court being at liberty to draw such inferences from the evidence as the jury might have done.

Bell (of Belleville), for the plaintiff, cited *Hitchman v. Walton*, 4 M. & W. 409; *McLeod v. Mercer*, 6 C. P. 197.

Henderson, contra, cited *Waterfall v. Penistone*, 3 Jur. N. S. 15; *Walton v. Jarvis*, 13 U. C. R. 616, 14 U. C. R. 640; *Hellawell v. Eastwood*, 6 Ex. 295; *Simpson v. Hartopp*, Willes 516; *Liford's case*, 11 Co. 50; *Trappes v. Harter*, 2 Cr. & M. 153; *Poole's Case*, 1 Salk. 368.

ROBINSON, C. J.—I do not think that upon the evidence before us we should be warranted in making any distinction in regard to the several parts or articles of machinery which are in question.

They are all described as constituting parts of the machinery that had been erected in the mill, and used in working it up to the time that the machinery had been detached from the building, and taken apart, in order to its being repaired, and in some respects altered, and, with some additions, restored to its proper place in the mill. For any thing that we can see, all formed part of the machinery of the grist-mill, and was necessary to the working of it, and the same principles of law are applicable to all that was seized.

Then, taking this to be so, if it had been shewn that, although it had been all used in the mill, yet the whole or any certain part of it, when it was taken down from its place in the mill, was intended to be discarded, and other machinery substituted for it, either to work upon the same or on any new principle, I should have no doubt that

whatever was not to have been set up again in the mill could be rightly treated as a chattel as it lay detached in the building.

But the evidence does not enable us to say that this was actually the case with regard to any part of the machinery, except perhaps the pair of stones spoken of in the affidavit.

While the machinery in question was up in the mill, before it was detached from the building, it could not in my opinion have been treated as a chattel by the sheriff coming with a *fi. fa.* against the goods of Bull, the owner of the mill, whatever might have been the case if he, being a tenant of the mill merely, had put in the machinery for the purpose of carrying on his trade in it.

On this subject I refer to the case of *Walton v. Jarvis* (13 U. C. R. 616, 14 U. C. R. 640), and to *Carscallen v. Moodie* (15 U. C. R. 304).

There is still the peculiarity in this case, that the machinery referred to was detached from the building, and taken to pieces when seized, though it still lay in the mill. That circumstance, I think, does not affect the case, the fact being, as it appears to be upon the evidence, that it was only removed temporarily for the purpose of being repaired and altered, and not with the intention of abandoning its use in the mill.—*Regina v. Wheeler*, 6 Mod. 187; *Amos and Ferrard on Fixtures*, 258; *Reynolds v. Shuler*, 5 Cowen, 323; *Liford's Case*, 11 Co. 50; *Gorton v. Faulkner*, 4 T.R. 567

This leaves, then, no other question to be considered but the effect of the mortgages which Bull had given upon the mill.

This issue has been framed for the purpose of having the question tried, whether the articles taken by the sheriff under the execution were, at the time of the writ being delivered to him, the property of the now claimant, Grant as against the plaintiffs in the writ.

The affirmative of that issue lies upon the claimant. To shew that the goods were then his, he produces a mortgage made by Bull on the 22nd of August, 1853, to Bailey, from whom he had purchased, of the land on which the grist-mill is situated, and an assignment of this mortgage made by

Bailey to the claimant, on the 29th of July, 1857 ; and he produces also a mortgage, made on the 13th of May, 1856, by Bull to the claimant himself of the same land on which the grist-mill is.

Whatever right the claimant acquired in the machinery in question as part of the freehold under the first mortgage, had not been acquired by him until after the execution against Bull was delivered to the sheriff, but at that time belonged to Bailey, the mortgagee. Whatever interest could pass to the claimant in the machinery under the mortgage afterwards made to this claimant, was his before the execution issued.

The case of *Gadsden v. Barrow* (9 Ex. 514) is an express authority to shew that on the trial of an issue framed as this is, it is competent to the defendant, the execution creditor, to shew that the title to the goods was not in the claimant at the time of the seizure, but in some other party, and that decision was recognized as correct, in the very late case of *Green v. Stevens* (2 H. & N. 146) ; and it does not appear to me that we can hold otherwise in this case on account of the circumstance, that, independently of the question of property, the things seized were part of the realty, and not liable to the writ at all.

The language maintained by the courts is, that unless the plaintiff in the interpleader, who is usually the claimant, as in this case, had either a general or a special property in the goods he had no right to interfere at all, and should have allowed the sheriff to proceed, subject, as of course he would be, to the claims of any other parties really interested. The question is not, as Mr. Bull assumed, whether the execution creditor had a right to have the goods seized upon his writ, but whether the plaintiff had such an interest in them as entitled him to resist the seizure.

The goods in this case were not taken out of the claimant's possession. He had therefore not that ground for questioning the right to seize, and was bound to shew on what other claim of right it was that he interfered with the remedy which the execution creditor was pursuing. Then had he no other sufficient claim ? He had not at the time of the seizure of the goods, on the 17th of June, 1857, any claim

by virtue of the mortgage that Bull had given to Bailey in 1853, because that had not then been assigned to him, though it was assigned to him a few weeks afterwards. And if that had been the only mortgage given by Bull, the case would have been a singular one in its circumstances, for if the object of the trial were simply to determine whether the sheriff, in seizing the machinery on the 17th of June, had committed a trespass upon this claimant, it is clear that he had committed no such trespass ; but so far as the object of this proceeding is to determine who shall have the articles themselves that were seized, or the proceeds of such of them as may have been sold by the sheriff, it is certainly most material to consider, that since the assignment of the mortgage to the plaintiff the contest about the property or their value must really be between the present holder of the mortgage and the execution creditor, the original mortgagee having no interest whatever in the dispute. Still, if there had been no mortgage but the first, Grant could have had no pretence for making a claim at the time of the seizure, or at the time that he *made the claim*.

But we have to consider the effect of the mortgage made in May, 1856, by Bull directly to the claimant : the whole money secured by which mortgage was due before the sheriff received the writ.

That surely conveyed to the claimant whatever interest Bull had in the realty, including fixtures, and although strictly speaking that was nothing that a court of law can regard, by reason of the prior conveyance by way of mortgage that had been made to Bailey, yet when that has been assigned to the claimant before the trial of the issue which is to determine how the things seized, or the proceeds of them, are to be disposed of, though after the sheriff's seizure, and, as I infer, after the claim made, it must, I think, be allowed to have the effect of removing the obstacle to the full operation of the mortgage of May, 1856, in favour of the plaintiff, so as not to interfere with the decision upon the plaintiff's claim under this issue, and to leave him to assert his claim under the mortgage given to himself, without prejudice from the other mortgage which is

also held by himself ; otherwise the real object of the interpleader will be defeated.

The first mortgage was for a comparatively small sum, no doubt considerably less than the value of the property mortgaged. The second was made to secure a much larger debt, and the plaintiff at the time of the trial held both. If the peculiar circumstances should in justice affect the claimant's right to costs, that I consider is a matter over which the statute gives a control to the judge who made the interpleader order.

MCLEAN, J.—There is no doubt, from the tenor of the affidavits admitted in evidence, that the mill was being repaired, and that the machinery had been temporarily detached for that purpose, and for the time being assumed the character and appearance of chattel property. But being appurtenant to the mill, and essential to the working and enjoyment of it, the machinery cannot be severed from the mill, but must be regarded as a part of the realty. If indeed it had been taken down for the purpose of being replaced with other machinery, or of being taken or removed to some other place or applied to some other use, it would lose its character as part of the fixture, and would become liable to be taken in execution ; but then the question would necessarily arise as to the ownership. If the mortgagors, after their mortgage had become forfeited, were permitted by the plaintiff to deal with the property as their own, and to remove or renew such portion of the machinery of the mill as they thought proper, they would most probably be considered the owners, and the property liable for their debts. But as the machinery is shewn to have been only detached from the mill for the purpose of making repairs, and while so detached must be considered a part of the mill, it is impossible that it can be liable to be seized on an execution against goods and chattels. The mortgage to the plaintiff undoubtedly gave him an interest in the mill and everything connected with it. He had a right to hold the whole as against the defendants as security for the amount of his mortgage money, and though the same pro-

perty might have been bound to a prior mortgagee for a sum of money, the defendants could not on that ground have been entitled to seize any portion of the mill as personal property liable upon their execution. I think that as against these defendants the plaintiff is entitled to succeed. He has an interest in the property ; the defendant can have none, the property seized being in fact part of the realty.

BURNS, J., having been absent during the argument, gave no judgment.

Judgment for the plaintiff.

JOHNSON V. THE PORT DOVER HARBOUR COMPANY.

Wharf—Duty to repair—Proof of Ownership—Excessive damages.

Held, that under the evidence, set out below. the ownership and possession by defendants of the wharf in question was sufficiently shewn to sustain an action against them by the plaintiff for injuries occasioned to him by not keeping it in repair ; and that the damages given were not excessive.

The declaration charged the defendants as being upon the 24th of May, 1853, the possessors and occupiers of a certain wharf, with the appurtenances, situate in the township of Woodhouse, which wharf before and at that time was kept and maintained by the defendants for the purpose of thereat and thereby loading and unloading, and shipping and unshipping to and from the vessels frequenting the said wharf, divers quantities of goods, &c., for reward, and the plaintiff, during all the time, was hired and employed, and but for the grievances complained of would have continued to be hired and employed as a sailor on board the vessel called "La Fayette," at £4 10s. per month ; and while the plaintiff was so employed, the said vessel was at the said wharf for the purpose aforesaid : that the said wharf was, at the time aforesaid, in an unsound, ruinous, dangerous, unsafe and improper state and condition, yet the defendants knowing the premises, whilst they were the possessors and occupiers, and after a sufficient time had elapsed, in which they might have repaired the wharf, wrongfully and unjustly permitted the wharf to continue dangerous, &c., and for want of proper repair the plaintiff, who in his employment, had

stepped from the vessel upon the wharf, while lawfully there fell through the upper part of the wharf into and between the materials thereof, and one of his legs was fractured, and the plaintiff became ill, lame and disordered, and remained so for a long time, and suffered and underwent great pain, and was prevented from attending to his affairs and business, and was deprived of his hiring and employment and his wages, and was also crippled and injured in his legs, and debilitated in bodily health and vigour, and rendered incapable at any future time to resume his said or any similar employment, and during such time did necessarily incur great expense in procuring meat, drink, &c., and did lay out large sums in and about endeavouring to be cured.

Pleas :—1st. Not guilty. 2nd. That the defendants were not the possessors or occupiers of the wharf. 3rd. That the wharf was not kept or maintained by defendants for the purposes stated. 4th. That it was not the duty of the defendants to have the wharf repaired.

* At the trial, at Simcoe, at the autumn assizes in 1857, before *Burns*, J., the facts appeared as follow : Previous to October, 1850, the harbour, piers, wharf and works at Port Dover belonged to the government, and the tolls and harbour dues were taken and received under the authority of government. At the end of the pier stood a lighthouse, which was under the management of the government, and the lighthouse keeper was paid by government up to the 1st of May, 1853. The government sold the harbour and pier, wharf, and other premises by public auction in October, 1850, and a company of individuals purchased the same under the authority of the statutes 13 & 14 Vic., ch. 14, and 12 Vic., ch. 5. These individuals, six in number, formed themselves into a company under the 12 Vic., ch. 84, and divided a capital of £8000 into 1600 shares, and called the company "The Port Dover Harbour Company." A deed signed by them for the shares and stock was executed on the 14th of October, 1850, and registered in the county of Norfolk on the 11th of December, 1850, containing a receipt on the face of the deed by the secretary and treasurer for the six per cent. required by the act to be paid.

From the year 1850 up to the 1st of July, 1853, the tolls and harbour dues were received for, and on behalf of the company so formed, or of individual members thereof. At the time of the transfer of the harbour by the government to the company, it was proved that the wharf, which was composed of the pier, was in a good state of repair, but afterwards was allowed to be out of repair. The pier was partly planked, and a hole had been made in the planks by the landing of some iron works from a vessel, and this hole was from seventeen to twenty inches in length, and nine inches in breadth. It was occasioned by the planks becoming rotten, and it was not repaired at the time of the accident to the plaintiff. On the 24th of May, 1853, the vessel, on board of which the plaintiff was engaged as a deck hand, was moored to the wharf, about three or four feet from the place where this hole was. It was proved that some persons knew of the hole, and had got in, and also horses had got in, but no injury had happened until that which occurred to the plaintiff. Those persons who knew of the hole of course took care to avoid it when going on the pier. It was proved by the captain of the vessel that he had several times during that day passed the place and did not observe the hole, though he said it was in the usual place where vessels load and unload cargoes. The vessel was, during that day, loading with lumber, and the plaintiff assisted as a hand of the vessel to load. Between 10 and 11 o'clock at night of the 24th of May, the plaintiff went ashore from the vessel to the wharf, and walking thereon fell into the hole, and his leg was broken. He was confined in the doctor's hands for a space of upwards of five months, during all which time he was not only out of work, but at expenses. Evidence was offered also that the plaintiff would sustain thereby a permanent injury. It was proved that the company of individuals so purchasing the harbour sold it to The Lake Erie and Woodstock Railway Company, but the transfer, dated the 25th of June, 1853, was that of four of the shareholders of the amounts of their shares to five other individuals. The Railway Company only received the tolls of the harbour after the 1st of

July, 1853, and up to that time the company called the *Port Dover Harbour Company*, or the individual members thereof, received the tolls, and also received the dues in May, 1853, from the vessel on board of which the plaintiff was engaged. The railway company, it seemed, paid the lighthouse-keeper from the 1st of May, 1853.

It was objected at the trial against the plaintiff's recovery—1st. That the government having paid the lighthouse-keeper to the 6th of May, 1853, and then after that time the railway company paying him, and the evidence shewing that the payment of the tolls and harbour dues was to two of the individuals of the company, rather than the company, up to the 1st of July, 1853, and then to the railway company after that time, there was no duty established upon the defendants as a corporation, as alleged in the declaration, to repair the wharf in any way.

2nd. That it was not proved that the defendants were in fact a corporation under the statute, for there was no proof of payment of the six per cent. of the capital stock in the first formation thereof.

3rd. That to render defendants liable, there should be some proof of transfer from the Crown to them in some way; the production of a deed of association of a certain number of individuals, with the evidence of receipt of tolls by some members of that association, not being sufficient to make a corporation liable.

The learned judge overruled the objections, but reserved leave to the defendants to move to enter a nonsuit.

The jury were directed to consider, 1st. Whether defendants, as a corporation, were, on the 24th of May, 1853, the possessors or occupiers of the wharf and harbour, or whether two of the individual shareholders were the occupiers, against whom it was contended the action should be brought, instead of the corporation.

2nd. Whether the defendants were guilty of carelessness in leaving the hole in the wharf, and whether the plaintiff had any knowledge or intimation of it, or that it was so apparent that he ought to have exercised some judgment in avoiding it: in fact, whether he contributed to the injury

himself: for if so, though the defendants might be to blame, yet if he acted without proper care and caution himself he could not make the defendants responsible.

3rd. With respect to damages, the jury would consider whether the plaintiff had sustained any permanent injury, beyond the length of time he had been out of work, and other expenses.

The jury found a verdict for the plaintiff, and £250 damages.

M. C. Cameron obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial for excessive damages.

Martin shewed cause.

ROBINSON, C. J.—Why the plaintiff deferred bringing his case to trial so long is not stated. He received the injury in May, 1853, and brought his action in March, 1854. The evidence seems to have established very clearly that the wharf or pier in question was carelessly suffered to be for a long time out of repair on that part on which the plaintiff received the injury, while nothing more seems to have been necessary than the substituting a sound plank for one that had become rotten.

The defect was apparent; others had fallen into the hole; it was considered dangerous; and it was suffered to be in that state, though it was on that part of the wharf at which vessels generally lie while they are taking in or discharging their cargo. The plaintiff was a deck hand on board of one of their vessels. He stepped from the vessel on the wharf after dark, got his leg into this hole, and broke it. Considering that he was five months disabled from the accident, and suffered much pain, and that his leg is not now well, and, as it seems, never will be as serviceable as it was before, I do not think we can possibly say that the damages were excessive, though the jury gave the full amount of damages laid in the declaration, which shews that they took a favourable view of the plaintiff's case. Some juries might perhaps have thought a less sum would be a sufficient compensation, but we cannot pronounce the amount that was given to be outrageous, and cannot interfere properly on that ground.

Then as to the injury being occasioned by the culpable negligence of the parties that were bound to keep the place in repair, there is no denying that the evidence made that out plainly; and the only remaining question is whether the defendants, the Port Dover Harbour Company, were the parties chargeable.

In my opinion it is proved by the evidence that they were, and that the plaintiff was entitled to succeed upon all the issues. The declaration does not found the action upon any of the statutes respecting public works made by joint stock companies, or acquired by such companies by purchase from the government, and there is nothing that I see in any of those statutes either conferring or interfering with the right of a person to sue for an injury sustained under circumstances like the present. The principles of the common law sustain this action, if it be true, as the jury found it was, that the pier in question was in the possession of the defendants, and used and enjoyed by them, and under their control.

The evidence, in my opinion, was sufficient to shew that this was the state of things, and the contrary was not established. I think, therefore, the rule should be discharged.

McLEAN, J.—The defendants are sued as a corporation for an injury sustained by the plaintiff while engaged in his occupation as a sailor attached to a vessel lying at the pier at Port Dover, in consequence of a defect in the planking of the pier while the harbour was the property of the defendants.

It appeared in evidence that on the 24th day of May, 1853, the vessel on which the plaintiff was serving was lying at the pier at Port Dover taking in a load of lumber, and that the defendant, on the night of that day, fell through the planking and broke his leg, so as to occasion him a permanent injury. It was also shewn that a company was formed under the statute authorizing the formation of joint stock companies under a deed duly registered, dated the 14th day of October, 1850, to purchase and hold the har-

bour, and that they were the owners and occupiers at the time of the injury to the plaintiff; the assignment alleged to have been made to Messrs. Farmer and others, bearing date on the 25th of June, 1853, after the injury had been sustained.

By the 12 Vic., ch. 84, sec. 35, it is made incumbent upon any joint stock company formed under that act for the construction of any road or public work to keep the same in repair after completion and the receipt of tolls; and any company failing to do so may be indicted. But though a mode is thus prescribed for proceeding on behalf of the public, individuals who sustain injury in consequence of such default may proceed by action to recover any damage sustained.

By the 13th & 14th Vic., ch. 14, sec. 1, the provisions of 12 Vic., ch. 84, are extended, and made to apply to any company to be formed for the purpose of acquiring forever, or for any term of years, any of the public roads, harbours, &c., so that from the time the Port Dover harbour was acquired by the defendants, it became their duty "to keep the same in good and sufficient repair."

The testimony shews that the pier was in good repair when it was purchased by the defendants, and that nothing was done by them to keep it in repair, and that the want of such repair was the cause of the injury to the plaintiff for which this action is brought.

As to the damage being excessive, the plaintiff appears to have been long confined, and to have suffered greatly by the fracture of his leg; and it further appears that the injury is one of a permanent nature, disqualifying him in a great measure from earning his living by his former occupation as a sailor. The jury having heard the evidence have found a verdict for £250, and under such circumstances the amount cannot be considered excessive, or at all events so excessive as to justify the granting of a new trial on that account.

BURNS, J., concurred.

Rule discharged.

KERR ET AL. V. HEREFORD ET AL.

Joint sureties—Mortgage by one—Judgment by default—Right to call co-defendant—C. L. P. Act, sec. 66—Practice.

The plaintiff sued defendants, H., M. & S., as joint makers of a note. H. & M. did not appear, and judgment was signed by mistake against all, but afterwards set aside as against S., who pleaded, 1. A mortgage given for the same money by M., M. & S. being sureties for H. 2. That a judgment had been obtained in this suit against all three defendants, and set aside as against S., but under the *fi. fa.* sued out upon it the sheriff had seized goods of H. & M., *more than sufficient to satisfy the judgment* and costs, and that he had made thereout £50, and still held the rest of the goods, out of which he could make the residue.

Held—1. That the giving a mortgage by M., one of two sureties, did not of itself discharge S., the other surety.

2. That an application to strike out the names of H. & M. from the record, so that they might be called as witnesses for S., was properly refused.
3. That the second plea was not supported, the evidence being that all the goods received brought only £9 at the sale. *Quære*, whether the plea formed a good defence.
4. That if by taking judgment against the defendants not appearing, the plaintiffs, under C. L. P. A., sec. 66, had lost their remedy against S., that objection could not be taken at the trial, but the proper course was to move to stay proceedings. *Semble*, however, that the plaintiff had not *elected* within the meaning of that clause to proceed against the others separately, the judgment against Shaw having been set aside.

The plaintiffs, as co-partners, sued Hereford, Murphy and Shaw, on two promissory notes made by defendants, and indorsed their summons specially with the particulars of their demand under the Common Law Procedure Act. Hereford and Murphy not having appeared according to the notice on the summons, judgment was signed against them, and the plaintiffs declared against the other defendant Shaw on the two notes, stating the notes as made by the three defendants, whereby they promised to pay (*i. e.*, for all that was stated, jointly), one note being dated the 15th of October, 1856, payable to plaintiffs in six months, for £195 4s. 1d., the other dated the 3rd of December, 1856, for £70 14s. 6d., payable in six months.

The defendant Allan Shaw pleaded, 1st. Payment.

2nd. To both counts, that before the making of the promissory notes, namely, on the 21st of October, 1856, Hereford was desirous of purchasing goods from the plaintiffs on credit, and on that day Shaw, at his request, agreed to guarantee payment to the extent of £300, or any less sum; that before these notes were made the plaintiffs did accordingly sell goods to Hereford to the amount of the two notes; and that afterwards, and before the notes were made, Shaw

desired to put an end to his agreement, and Murphy, the other defendant, agreed to become security in his place for Hereford, for the goods that had been supplied, and also for goods to be thereafter supplied by the plaintiffs to Hereford, of which the plaintiffs had notice; that it was agreed between the plaintiffs and Murphy and Shaw, that if Murphy would, within a reasonable time, give a mortgage to the plaintiffs on certain lands of his, for the amount already due by Hereford, and for goods to be thereafter supplied to him, to the amount in all of £500, and if *in the meantime*, until the mortgage should be given, the defendants would give their notes to the plaintiffs for the amount of goods that had been sold to Hereford, then, so soon as the mortgage should be given by Murphy, Shaw should be discharged from his guaranty, and from the payment of the notes to be given in the meantime; that in pursuance of this agreement between the plaintiffs, Murphy and Shaw, the three defendants made and delivered the two notes now sued upon; which the plaintiffs held and now hold for no other consideration, and only upon the said agreement; that on the 23rd of February, 1857, Murphy made and delivered to the plaintiffs a mortgage upon his lands, as agreed, to secure the amount of goods supplied and to be supplied to Hereford, to the amount in all of £500, and the plaintiffs received it on the terms mentioned, whereby the said Shaw became and was wholly discharged from the payment of the notes, and the same became wholly satisfied and discharged.

These pleas were pleaded on the 8th of March, 1858.

On the 13th of March, 1858, the defendant Shaw pleaded a further plea, that since the commencement of this suit such proceedings were had in this cause, that judgment was obtained against him, Shaw, and against the other defendants Hereford and Murphy, sued with him; that a writ of *fi. fa.* was sued out upon the judgment against the goods of all these defendants, and delivered to the sheriff; that the judgment was afterwards set aside as against him, Shaw, but stood in full force against the other two defendants; that the *fi. fa.* was still in the sheriff's hands, and was in

force, and not withdrawn or superseded; that under it the sheriff had seized a large quantity of goods of Hereford and Murphy, *more than sufficient to satisfy the judgment and all costs of execution, etc.*, and that he had made thereout a large sum, viz., £50, and still held the rest of the goods under execution, out of which he could make the residue of the moneys.

The plaintiffs took issue on the pleas.

At the trial, at London, before *Robinson*, C.J., the counsel for defendant Shaw applied to have the names of Hereford and Murphy struck out of the record, in order that they might be examined as witnesses in support of Shaw's pleas. The learned Chief Justice declined, because the notes being joint, if the defence against any one of the makers succeeded, the notes could not be enforced against the others, notwithstanding the judgment against them by default.

The notes and interest were computed to amount to £280 9s. 10d.

It was objected by defendant Shaw, that owing to proceedings which had taken place in this cause, the plaintiffs could not legally carry down the record in its present shape, but the learned Chief Justice held that, if by reason of anything that had taken place the record should not have been made up as it was, the defendants should have moved before the trial, or might have ground to move in term against the verdict, but that he had only to try with the aid of the jury the issues that were upon the record.

It became a question upon the production of the mortgage, and on the evidence generally, whether the notes sued on were discharged in effect by giving the higher security, or whether the mortgage was to be regarded as collateral security.

Shaw's counsel contended that the fact of giving a mortgage by Murphy to secure the amount of the notes, with other moneys, disabled the plaintiffs from recovering upon the notes; and that, as the three defendants were joint makers, the discharge of Murphy necessarily operated in discharge of the others. The learned Chief Justice left this objection to be renewed, overruling it at the trial, and ex-

pressed a doubt whether a discharge by merger of one of the defendants, by his giving a security by specialty, would necessarily relieve all the parties from the liabilities on the notes. Of course, if it did, the effect would be to discharge Hereford and Shaw altogether. In this case it was said that the land was found to be subject to a prior mortgage, and was insufficient to secure the debt due.

It was proved that on the 27th of February, 1858, a judge in chambers had set aside the judgment and *fi. fa.*, against Shaw, against whom judgment had been at first signed as well as against the others, on the 12th of January, 1858, and a *fi. fa.* issued thereon on the 22nd of January, for \$1143.83. Under this writ the sheriff seized some goods of Murphy's, which brought on sale only £9, though they would seem to have been worth considerably more.

This evidence was held not to support the 3rd plea, which averred that goods were seized *sufficient to satisfy the debt*. The deputy sheriff swore that he sold all that he had seized, and that there was nothing more to seize.

At the conclusion of the whole evidence the learned Chief Justice told the jury that neither the second nor third plea appeared to be proved, for the agreement set out in the second plea was not proved; and the facts averred in the third plea were not proved, for there was only £9 made on the *fi. fa.*, and not goods seized to satisfy the whole debt.

A verdict was rendered for the plaintiffs for £151 4s. 10d.

McMichael obtained a rule on the plaintiffs to shew cause why the verdict should not be set aside on the law and evidence, and for misdirection in ruling that the last plea was not proved, and that there was no evidence of merger of the notes in a higher security; and for the rejection of legal evidence; or why the verdict should not be reduced to the amount that remained due after the execution of the *fi. fa.*

Read shewed cause.

ROBINSON, C. J.—It is very plain, in my opinion, that all I had to do at the trial was to dispose of the issues with the aid of the jury. If by reason of what had taken place in the cause, the plaintiff could not regularly carry down his

record in the shape he did, the defendants should have made an application before the trial to restrain the proceedings which he was adopting ; and if he could not legally try his case as he did, upon the issues which the defendant Shaw had raised by his pleas, it was open to him to move afterwards against the verdict on that ground. Upon this rule we are confined, as the court was upon the trial, to a comparison of the evidence with the pleadings, in order to see whether the plaintiff was entitled to recover, and for what.

But at any rate, the judgment and execution being against the three defendants in the first place, and being set aside as against Shaw, though that did leave the execution still out against the others, and not against him, yet it was not that act of election to take out execution against the others separately which could bring the case within the 66th clause of the Common Law Procedure Act, and it cannot be contended that the having judgment against two of the three joint debtors, prevented the plaintiff from enforcing his action afterwards against the third, for the judgment was not satisfaction, and the execution has not produced satisfaction ; and the principle of *transit in rem judicatam* applies only in regard to the same person, not where the judgment is against one of several persons jointly liable, and the attempt is to enforce a remedy against another upon the same demand. The case of *Drake v. Mitchell* (3 East 251) is a very clear authority on that point.

Then as to the verdict which has been given. In my opinion the defendants failed to prove either of their pleas. As to the second plea, there was no proof of such an agreement as that plea sets out, but the contrary, according to the evidence of a witness called by the defendants, who swore that the persons who had given the notes were to remain *liable* upon them notwithstanding the mortgage, and the mere fact of one surety for a debt (not the principal) having given a mortgage as an additional security, does not, I think, discharge another surety bound jointly with him in a simple contract, as is shewn by the case of *Bell v. Banks* (3 M. & Gr. 258).

The third plea failed, because the evidence shewed that

it was not the fact that the sheriff seized goods sufficient to satisfy the judgment, but they were very far short.

There was an error of £10 in the computation hastily made at the trial. The verdict should have been for £141 4s. 10d., instead of £151 4s. 10d.

Upon the plaintiffs consenting to remit the £10, the rule should, in my opinion, be discharged.

BURNS, J.—I do not take the rule *nisi* obtained in this case to complain of any misdirection of the learned Chief Justice, with respect to the facts of the case as proved when applied to the second plea, but the ground of complaint is that the production of the mortgage made by one of the defendants, which covered the note in question, *ipso facto* was a discharge of the note as against all the defendants. That, however, clearly is not so. The whole three parties to this record are joint makers of both notes, and the evidence shews that Hereford was the principal, and the other two defendants were sureties for him. It was some months after the notes were given that Murphy, one of the sureties, gave a mortgage to secure further the notes in question, as also to cover further goods to be sold to Hereford. The authorities are clear that the mortgage so given by Murphy did not cause the joint notes of the three to merge in it. I refer to *White v. Cuyler* (6 T. R. 176), *Drake v. Mitchell* (3 East 251), and *Bell v. Banks* (3 M. & Gr. 258). This last case is also an authority to shew that the learned Chief Justice was quite right in rejecting the two defendants against whom there was a judgment by default, when they were offered as witnesses.

With respect to the facts set out in the third plea, and those proved at the trial, there is no cause for finding fault with the view taken of the case at *nisi prius*. It appears to me the defendants' proper course, under the 66th section of the Common Law Procedure Act, is to move the court to stay proceedings; and where under that section the plaintiff has taken his judgment against defendants who have not appeared to a specially indorsed writ, as he may do, and abandon proceedings against another who does appear, that

fact does not form the subject matter of a plea. The remedy given to a plaintiff in cases of that kind is the creature of the statute, and in a case like the present, where judgment is obtained by default against two out of three joint contractors, if the third could set up by way of plea that the plaintiff had abandoned his case against him by reason of that judgment, there would, in the event of the defendant succeeding, be an apparent inconsistency upon the record, or the rule of law is, that failing to recover against one of two joint contractors, there must be a failure against both. It is true it may be answered by what I have said before, that though there would be such inconsistency as that of a judgment against one for a joint debt, and in favour of the other, that such was the effect of the law altering the rule and giving the plaintiff an option against whom to proceed. We must bear in mind that the exercise of this option is a fact to take place after the action has been commenced, and does not form a ground to bar the cause of action as it stood when the writ was sued out. It seems to me much better to hold that it should be the subject matter of a motion to stay proceedings, than to incumber a record with an issue, not whether a debt is due or not, but whether the plaintiff has or not elected to abandon that debt as against some or one of the parties upon the record. In the present case, however, I take the gist of the plea to be as it was taken at the trial, that is, whether the cause of action was satisfied by means of the judgment and execution against the other parties. It is clear from the evidence that no satisfaction was produced of more than a small sum of £9, and so the plea, if a good defence, was not proved. I have great doubts whether the plea, even if true, would be an answer to the action, for it only avers £50 to have been made of the goods, and that for the residue the sheriff holds goods under the execution, out of which he *can make* the remainder of the debt.—See *Drake v. Mitchell* (3 East 251.)

MCLEAN, J., concurred.

Rule discharged.

THE QUEEN V. THE GRAND TRUNK RAILWAY COMPANY.

Indictment against railway company for nuisance in obstructing the highway, by improper construction of their road in crossing it—Conviction—Motion for judgment—Practice.

INDICTMENT for a nuisance to a public highway, between concessions A. & B., in the township of Etobicoke, in the county of York.

The indictment was removed into this court by *certiorari*, and after an ineffectual attempt at arbitration, it was tried upon a *nisi prius* record, before *Draper*, C. J., at the assizes held in Toronto, in October, 1857, and the defendants were found guilty.

The nuisance complained of was that the defendants, in taking their railway across the highway in question, had lowered the highway at the point of intersection, so as to make it inconvenient and dangerous, especially for loaded teams to descend upon and ascend from the railway track in passing along the highway across it, and that the danger was much increased by the circumstance that the railway came upon the highway from a deep cutting, which made it impossible to observe the approach of trains at a distance, or in time to take warning before crossing the track of the railway.

In Easter Term, 1858, nothing having been done towards abating the nuisance complained of, as the prosecutors had been led to expect there would be, *C. S. Patterson* moved for judgment on the conviction. Affidavits were filed on the part of the prosecution; none on the defendants' part.

Neither of the defendants' counsel, nor any of their officers, were in court when judgment was moved.

At the sittings after the term to deliver judgment, *Robinson*, C. J., said:

"I do not think we can properly, under the Common Law Procedure Act, sec. 316, give judgment out of term in a matter of this nature, though perhaps we might.

"Supposing nothing has been done, we should in the general course give judgment to abate the nuisance, and inflict a nominal fine; but *quære*, in this case is the abatement or prostration spoken of in the books applicable; there is nothing

here to pull down ; and can the nuisance be abated, properly speaking, otherwise than by crossing at some other point ; and should not the prosecutors have proceeded by *mandamus* to compel the company to carry the statute into effect, by restoring the road to its former state of usefulness ?

“ It may be that the company not having done it, are properly held to be guilty of nuisance, though authorised to lay the track across the road, because, if they have not performed the conditions on which the authority was given to them, they are to be looked upon as occupying the highway without authority.

“ The defendants' counsel should have notice that judgment has been moved for, and an opportunity of filing affidavits or addressing the court.”

Afterwards, in Trinity Term, no arrangement having been come to respecting the nuisance complained of, *Patterson* again asked for judgment. Mr. *Bell*, solicitor for the Grand Trunk Railway Company, being in court, and having received notice that judgment would be moved for, said he had no instructions ; that he was not solicitor for this part of the line, (in Etobicoke,) but at Belleville ; that the solicitor here, Mr. *Galt*, was absent, and he was not prepared to engage for any thing, or to represent the company in the matter.

He urged that the prosecutors and the company should refer to some competent and disinterested engineer, as to what was reasonable and proper to be done for obviating the detriment complained of to the highway, and that this conviction should stand as it was, without sentence passed upon it, till the result was known.

The prosecutor's council did not object to this, but complained that he had met with nothing but delay in his efforts to have something done, and that the company would give no attention to it.

It was intimated that there was some difficulty between the company and their contractors in regard to this matter, and that this had induced the company to delay taking such steps as would otherwise be proper.

The prosecutors filed affidavits, the defendants filed none. Those on the part of the prosecution stated various

attempts made to procure the abatement of the nuisance without proceeding to extremities, repeated promises on the part of the defendants, but nothing done, and the highway in the meantime becoming worse, and for a time last spring nearly impassable. And that the costs of the prosecution, including disbursements, amounted to £84 13s. 6d.

ROBINSON, C. J., delivered the judgment of the court.

This case is very like *Regina v. Scott et. al.*, 3 Q. B. 543 ; see also *Regina v. North of England R. W. Co.*, 9 Q. B. 315.

The defendants have had ample notice of the moving for judgment, and opportunity of producing affidavits in mitigation : they shew nothing, and apparently take no trouble in the matter.

The proper sentence seems to be that they should pay a fine, and that the nuisance complained of be abated.

As to abating the nuisance, there may be great practical difficulties in the way, and such as, if the parties had in a proper manner laid them before us, might have influenced our judgment, but we are left to conjecture upon that point. Under the Railway Law in Ireland there are commissioners, who on behalf of the public would have had the highway restored to its proper state at the expense of the company ; and in England, or here, another course was open than that by indictment, namely, by moving for a *mandamus* to the company to carry the statute into effect, by restoring the highway to its former state as nearly as circumstances will permit ; but the course which has been taken is a legal course, though perhaps not the most convenient, and we must give effect to the conviction.

Our judgment is that defendants pay a fine to the Queen of £100, and that the nuisance complained of be abated.

During this term the following gentlemen were called to the bar :—GEORGE PALMER, ROBERT JOHN WILSON, JOHN MCBRIDE, NICOL KINGSMILL, THOMAS WARDLAW TAYLOR.

MICHAELMAS TERM, 22 VICTORIA, 1858.

Present :

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.
 “ ARCHIBALD MCLEAN, J.
 “ ROBERT EASTON BURNS, J.

WILSON V. KERR ET AL.

Assignment in trust for creditors—Improper stipulations—Change of possession—Description of goods.

“ All and singular the stock in trade of the said W.” (the assignor) “ *situate on Ontario street*, in the said town of Stratford, and also all his other goods, chattels, furniture, &c.” *Held*, an insufficient description as to all the goods. In an interpleader issue to try the validity of an assignment in trust for creditors, the court being left to draw the same inferences as a jury.

Held, that it was fraudulent for the assignor to assign on the understanding that he should be allowed to keep possession of his household furniture.

Held, further, that the assignment was also fraudulent, because it contained a stipulation that no creditors should share except those executing within forty days, and a release in full on condition of their getting the dividend out of the proceeds of the goods assigned, with a proviso that the surplus should go to the assignor.

Held, also, that the facts stated below did not shew a sufficient change of possession to dispense with filing.

INTERPLEADER. The plaintiff claimed under an assignment from R. D. Wilson, his brother. The defendants were execution creditors of R. D. Wilson.

The assignor, R. D. Wilson, being insolvent, proposed to some of his creditors to make an assignment to them for the benefit of his creditors generally, but he wanted to reserve to himself the privilege of being unmolested in the possession of his household furniture. This was declined.

He then made an assignment to his brother, the plaintiff, who lived at Hamilton, sixty or seventy miles from the shop in which the goods were, and he gave as a reason for this, that his brother would be more anxious to make the most of the property. His brother did go up to Stratford, and stayed two or three days, and assisted in taking stock, and then he locked up the building and returned to Hamilton,

leaving the key in the possession of the postmaster at Stratford, from whom it seemed to have got into the possession of R. D. Wilson, who had constant access to the shop by a back entrance, though the street door was kept fastened.

The assignment was dated 13th of March, 1858. It was made to the plaintiff in trust for creditors who should execute within forty days. A clause of release by creditors executing of all claim beyond what the dividends might produce was contained in the instrument, and the surplus, after paying out the proceeds rateably to the creditors who should execute, was by the terms of the trust to be paid over to the assignor.

The property intended to be transferred by the deed was described as "all and singular the stock in trade of the said R. D. Wilson, situate on Ontario street, in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle, and also all bonds, bills, notes, debts, choses in action, terms of years, leases, securities for money."

At the trial, at Stratford, before *Robinson*, C.J., after all the evidence had been given, the parties agreed that it should be left to the court to determine whether the plaintiff was entitled to succeed in regard to all or any part of the property claimed, or whether a nonsuit should be entered.

The defendants objected on the trial, that the goods assigned were not sufficiently described, and especially as to the household furniture, and everything besides the stock in trade; and also that the assignment which had been filed under the act was fraudulent, because there was no such change of possession as could make it valid.

A verdict was taken for the plaintiff, subject to the opinion of this court upon the evidence, the court to be at liberty to draw the same inferences as they might think the jury should have done.

Martin, for the plaintiff, cited *Gildersleeve v. Corby et al.*, 15 U. C. R. 153; 27 L. J. Ex. 378; *McPherson v. Reynolds*, 6 C. P. 495; *Congreve v. Evetts*, 10 Ex. 298; *Reeves v. Capper*, 5 Bing. N. C. 136; *Flory v. Denny*, 7 Ex. 584; *Gildersleeve v. Ault*, 15 U. C. R. 401.

Burton, for defendant, cited *Short v. Ruttan*, 12 U. C. R. 79; *Olmstead et al. v. Smith et al.*, 15 U. C. R. 421; *Balkwell v. Beddome*, 16 U. C. R. 206; *Harris et al. v. Commercial Bank*, *Ib.* 437.

ROBINSON, C.J.—There was a visible change in this respect, that the shop was no longer kept open, but it is hard to say that there was such a change made of the custody of the goods from the hands of the assignor to the hands of the assignee as might be expected to follow a *bona fide* transfer. The assignment was filed according to the statute, and therefore the objection as to possession not being changed could only be urged as constituting a badge of fraud.

Then, further, I think the goods were not sufficiently described by stating them to be situated on Ontario street, without saying they were in the shop or on the premises of the assignor situate upon that street; and as to anything but the stock in trade there really was no description at all.

It was fraudulent, too, I think, for the assignor to assign only on the understanding that he should be allowed to keep possession of his household furniture, which he did keep and enjoy just as before.

In my opinion it was also fraudulent by reason of the stipulation contained in the assignment that no creditors should share in the proceeds, except such as should execute the assignment within forty days, which assignment contained a release by the creditors who should execute of all the debts in full, on condition of their getting the dividend out of what the effects might produce, and a provision that after the executing creditors should be paid their dividend any surplus that there might be should go to the assignor.

This comes, I think, within the principle of those cases in which assignments have been held void as to creditors who could not execute without coming under such conditions as would subject them to be treated as partners in a continued business, proposed by the deed of trust to be carried on in order to the better winding up the affairs of the estate. It is an attempt to coerce the creditors to come

under a disadvantageous condition at the peril of getting nothing.

In my opinion a nonsuit should be entered.

BURNS, J.—The only point which I have considered is whether in describing what was intended to pass by the deed the fourth section of the statute 20 Vic., ch. 3, has been complied with, and upon that I think the plaintiff's case fails.

According to the wording of the deed, the case presents two questions : first, with respect to the *stock in trade*, and next, with respect to *all other goods, chattels, furniture, household effects, horses, cattle, and also all bonds, &c.* The latter cannot be held a compliance with the provision that they are so to be described, that the same may be thereby readily and easily known and distinguished. Where all or any of these things then were, or were to be found, the deed is silent. Of course it could not be expected that every chair or table must be so described that by reading the description in the deed a person could go and identify them ; but surely the legislature meant something when the enactment was made. If it would be inconvenient to describe each article or each set of articles, either as to numbers or quantities, marks, or otherwise, that they might be known, yet a description by locality might be given which would enable a person to go with the deed in his hands and point out the goods transferred. No one, however, on reading this deed, could possibly say any of these *other* things mentioned could either be readily or easily known or distinguished. *Quoad* these things the plaintiff's case must, I think, fail.

Then with regard to the stock in trade. This is a term very well known in bankruptcy matters, and I should find no fault with that expression if we had further information to tell us what it was that was assigned. There is an attempt in this to give information as to locality, but it is very vague. The deed simply says, the stock in trade situate on Ontario street, in the town of Stratford. What part of the street we are to look for it in the deed does not

tell us. Further, we are not informed what description of stock in trade it is; there is nothing on the face of the deed to give us the slightest idea whether it was the stock in trade of a dry goods dealer, a grocer, a distiller, a brewer, or of any kind of business which the assignors carried on. The deed is singularly silent with respect to any information from which a person reading it might even draw an inference, except that the assignor is described himself to be a merchant. Without that term used in describing him we should not know what he was; but will that do from which to draw an inference that the stock in trade assigned was that of a merchant? It does not appear to me that would be a compliance with the act of parliament. The term merchant, with reference to the business carried on, is as convertible as that of stock in trade. The proper definition of the term is applicable to one who traffics or carries on trade with foreign countries, as an exporter or importer. The popular usage of the expression is to apply it to any trader, or one who deals in the purchase of goods. There are wheat merchants, timber merchants, lumber merchants, and a thousand others, as well as a dealer in cottons, calicoes, and what not. I do not see that we are helped at all in finding out what the stock in trade was by being told that the assignor was a merchant. To be sure we discover it by reference to the evidence; but the question is, whether this information should not exist on the face of the deed. The statute says it shall contain such efficient and full description thereof, &c. It does not appear to me this deed does contain such efficient description as that any one can possibly say what the stock in trade was that was transferred. If we had been told in what house it was, or on what premises the same might be found, that perhaps might have helped, but we are told the stock in trade will be found *on the street in Stratford*. To take this literally, the public would have the opportunity of helping itself, or the corporation might complain of a nuisance. I think we should scarcely look for the goods upon the street, but the parties might have told us better where to find them.

McLEAN, J., concurred.

Judgment for defendants.

EADES AND BRATT V. MAXWELL.

Presumption of deed—Evidence—Confession given by administratrix—Sale under it of testator's land—Purchase by her—Fi. fa. goods not shewn.

EJECTMENT. The plaintiff claimed under the grandson and heir at law of the patentee, Francis Drouillard ; defendant under his second son, Dennis, to whom it was alleged that he had conveyed. The patent was for 1200 acres, including the land in question. The heir at law, who conveyed to the plaintiffs, was living in the state of Michigan, and appeared to have believed he had no title when the plaintiffs purchased from him there his right for a small consideration. For the defendant it was proved that it was always understood in the family of the patentee that Dennis owned this land : that Dennis had lent his father money, who had been heard to say that he had given him this land for the debt, if he could not pay : that he afterwards said he could not ; and he and Dennis went together to the land, that his father might put him in possession ; and on their return the father said he was relieved from the debt, having given Dennis the land ; this was before 1812. The eldest son of the patentee had never set up any claim, knowing, as his brother swore, that Dennis owned the land. Dennis devised this, with other land, among his children, who by partition conveyed it to one of them, James, who afterwards devised to his brother Richard. Richard died, and his land was sold under a judgment obtained against Catharine, his wife, on a confession given by her as his administratrix, and was purchased by her at the sale, and conveyed to defendant. Catharine and her second husband, M., first went on the land in 1836, and defendant and his father had held it since. The plaintiffs had also taken a conveyance from the heirs of Dennis.

Held, Burns, J., dissenting, that there was sufficient evidence to leave to the jury on which to presume a conveyance by the patentee to Dennis, and that having found for defendant their verdict should not be disturbed.

Held, also, that the fact of Catharine being administratrix could not be impeached, so long as the letters of administration granted to her remained in force. That she could legally give the confession she did, and purchase under the judgment obtained on it against herself, though it might furnish grounds for suspicion of fraud ; and that the fact that the writ against lands appeared by the deed to have issued on the same day as that against goods was no objection.

EJECTMENT, for the west half of the front half of lot No. 11, on the east side of the communication road, in the 1st concession of Harwich. Writ dated 10th of March, 1858.

At the trial, at Chatham, before *Robinson, C. J.*, it appeared that the crown, in July, 1803, made a patent to Francis Drouillard for 1200 acres of land in Harwich, of which the fifty acres claimed in this action was part. He had several sons, of whom Solomon was the eldest and Dennis the next, and he had also an only daughter, who married one Jeanisse.

The patentee died just after the war with America, in 1812, having made a will, as one of his brothers, Alexis Drouillard, swore he understood, by which he left all his property to his daughter, Mrs. Jeanisse. No such will,

however, was produced at the trial. There was none registered, and no one swore that he had ever seen the will. According to the report in the family of any such document it was said to have made no mention of this land in Harwich.

Solomon, the eldest son, died intestate soon after his father, and Jacques Drouillard, his eldest son and heir, conveyed, on the 2nd of November, 1857, certain lands in Harwich, and other lands, to these plaintiffs, for £100, in all eleven lots of land in the townships of Harwich and Dover, one of them being the lot No. 11 mentioned in the declaration.

The grantor in this deed swore that one of the plaintiffs came to him in the state of Michigan, where he was living, and made this bargain with him. He had heard so long ago as in 1837, he said, that he had a claim to this land, and went to consult a lawyer about it, who told him that he had no claim. He had heard, he said, that his grandfather, the patentee, had given or sold some of this land in Harwich to his son Dennis (the witness's uncle), but did not know the truth of that, or how much had been sold or given to Dennis. He swore that he never knew till lately that any one was in possession of the land in question.

It appeared from this witness's account that he had been long satisfied by his enquiries that he had no title to the land, and for all that appeared had no thought of claiming it; but that the plaintiffs having hunted him up in a foreign country, proposed to him to make a deed to them for a consideration almost nominal, and he consented.

It was sworn by Alexis Drouillard, a son of the patentee, that when the eldest son, Solomon, heard of his father's having made a will he renounced all claim in favour of his sister, Mrs. Jeanisse, the patentee's daughter, to whom he was understood to have left whatever he had to dispose of. Where this will was (if such a one ever was executed) was not explained, otherwise than by Alexis, his son, swearing that the family of the patentee "had it among them;" but Alexis swore that he was sure his father did make a will, but that it made no mention of this land. He swore further, that before Solomon died it was understood in the family that Dennis, second son of the patentee, owned this

land, or rather would own it *if it should not be redeemed*. He could not swear that he knew that a deed was ever made by the patentee to Dennis, but he was satisfied, he said, that Dennis would not have taken the land for the debt without getting a deed of it.

He stated that Dennis had lent his father money to build a house, and that he heard his father say he owed Dennis £100, and had given him this land for the debt, if he could not otherwise pay it, and that he afterwards declared he could not redeem it, that the patentee and his son Dennis went down in consequence together to see the land, in order that the former might put the latter in possession, and that on their return the patentee said that he was now relieved from the debt he had owed to Dennis, having given him the land. This must have been before 1812. Alexis Drouillard swore further, that Solomon never set up any claim to this land as heir of his father, and that he knew, as they all did, that his brother Dennis owned the land.

The defendant, besides impeaching, by cross-examination of the plaintiffs' witnesses, the right of Solomon or his son to inherit from the patentee, on account of the alleged conveyance to Dennis by the patentee, which he had attempted to prove, brought evidence to trace a title down from Dennis to the defendant. He proved that Dennis had sons, Richard, Dennis, Alexander, and James, and a daughter, Catharine; and it was admitted that he had made a will, whereby the land in question in this action was devised by him to these children of his, and that on the 30th of June, 1834, Richard, Dennis, Alexander, and Catharine joined in executing a conveyance to James, their brother (son of Dennis), of 1000 acres, including the land in question in this action. This deed was made, as its recitals shewed, upon an arrangement among the devisees of Dennis for partitioning the lands devised in severalty among them, and for a further consideration of £200 paid by James to the others. It was registered on the 14th of July, 1834.

James, the grantee in that deed, died soon after, having first made his will, and devised the lot No. 11 mentioned in the declaration to his brother Richard Drouillard.

Richard Drouillard afterwards died, and on the 23rd of June, 1838, a judgment was obtained in this court at the suit of Alexander Chewett against Moses Meas and Catharine Metis, formerly Drouillard, administratrix with the will annexed of her husband, Richard Drouillard, for £420 debt and costs. The judgment was entered on a confession by the defendant of a debt due by the late Richard Drouillard in his life time to the plaintiff, for money lent, and paid and expended. In the cognovit, which was dated the 5th of February, 1835, the true debt was stated to be £210.

Richard Drouillard, on the 8th of September, 1832, made a will, whereby he directed as much of his *moveable* property to be sold as might be necessary for paying his debts; "and whatever remains," he proceeded to say, "I bequeath to my beloved wife Catharine, so long as she remains a widow, and in event of her marrying I bequeath all my property" (of every) "name or nature to my two children, Cora and Sarah Anne, and by no means must any of my property be disposed of but for the purpose of paying my debts." He then named his brother James (who was *then* living) and his brother-in-law, Joseph Monger, his executors.

On the 23rd of August, 1834, Richard Drouillard made a codicil to his will, appointing his brother Alexander and Alexis Trudelle executors, instead of the two first named, and directing that his third daughter, Elizabeth, should have an equal share with his other two children mentioned in his will.

On the 23rd of September, 1834, administration of the will and codicil annexed was granted by the surrogate court to Catharine, widow of the deceased Richard Drouillard, on her petition setting forth that Alexander Drouillard had died, and that Alexis Trudelle had renounced.

The sheriff's deed, made upon the sale under the execution which issued upon the judgment, recited that the writ against lands was tested 23rd of June, 1838, which was the day the judgment was entered, and it did not recite any *fi. fa.* against goods, nor that any such writ was returned. It stated that under the *fi. fa.* against lands the sheriff had sold to Catharine Drouillard, widow, for £50 bid for the same at

public auction, the front half of lot No. 11, east of the communication road, in the township of Harwich, 100 acres, and also the east half of lot No. 3 in the 1st concession of Dover west, there in the possession of Moses Metis and Catharine Metis, administratrix as aforesaid, and all the estate and interest which the said Moses Metis and Catharine Metis, as administratrix as aforesaid, had in the said land. This deed was dated the 5th of October, 1839, and was registered on the 19th day of May, 1840.

It was proved that Catharine Drouillard (or Metis) conveyed the west half of the west half of the lot in question in 1840 to Thomas Maxwell; and on the 29th August, 1850, Thomas Maxwell devised the above fifty acres to his son, the defendant.

It was sworn that Metis first went upon this tract of fifty acres in 1836, and made a small clearing on it. The widow, Catharine Drouillard, at that time lived with Metis. Then, in September, 1837, Thomas Maxwell came on the land, and lived on it till he died in 1850, and his son, this defendant, from thence till this time had occupied the land. It was at the time of the trial nearly all cleared.

Towards the end of the case a grandson of the patentee by a daughter was called, and swore that it was understood in the family that Francois, the patentee, being indebted to Dennis, sold him this lot: that the whole family so understood: that it was always known to be his: that Dennis' title had always been admitted in the family; and that his belief was that a deed had been made of the 1200 acres to Dennis by his father, but the witness could not say that there was of his own knowledge.

It was admitted by defendant upon the trial that Richard Drouillard had three daughters only, and no son; and deeds were produced from them to the plaintiffs in this action, conveying all their right in this land to them.

The learned Chief Justice directed the jury, if they were satisfied from the evidence that the patentee had conveyed this land by deed to his son Dennis, to find for the defendant, in order that their conclusion might be expressed upon the fact, though he expressed a doubt whether the evidence was such as would warrant such a finding, either on the principle of presuming a grant or otherwise.

If such a deed were made to Dennis, there was still the title of the plaintiffs under the conveyances lately obtained from the daughters and devisees of Richard, the son of Dennis, who claimed under his father Dennis, through the will of Dennis, and the deed of partition made by his brothers and sisters in his favour, which deed, however, could have no operation if the sheriff's deed under the sale made upon the *fi. fa.* against Richard's lands on the judgment against his administratrix with the will annexed conveyed to the widow and administratrix, as highest bidder at that sale, whatever estate in this land Richard died seised of.

The jury found for the defendant.

Prince obtained a rule *nisi* to enter a verdict for the plaintiffs, or for a new trial, if the court should be of opinion that there was not evidence sufficient to support the presumption of a conveyance from Francis Drouillard to his son Dennis, or that the sheriff's sale under which defendant claimed was for any cause illegal, so that defendant could not make title under it.

Christopher Robinson shewed cause, and cited *Tay. Ev.* 129; *McDonald v. Prentiss*, 14 U. C. R. 79; *White v. Myers*, 10 U. C. R. 574; *Doe Lyon v. Lege*, 4 U. C. R. 360; *Doe Spafford v. Brown*, 3 O. S. 92; *Doe Boulton v. Fergusson*, 5 U. C. R. 515.

Philpotts (*Prince* with him), contra, cited *Doe Fenwick v. Reed*, 5 B. & Al. 232; *Doe Graham v. Scott*, 11 East 483; *Roe dem. Reade v. Reade*, 8 T. R. 122; *Doe dem. Blackwell v. Plowman*, 2 B. & Ad. 573; *Sug. V. & P. Vol. II.* 196.

ROBINSON, C. J.—I think the patentee having, before his death in 1812, been heard to acknowledge that he owed his son Dennis £100 for money advanced to him to enable him to build his house: that he was unable to redeem his land in Harwich, which he had given him for such debt, and had therefore gone with him to the land and put him in possession, he, the patentee, having held the patent for some years before that, added to the fact that neither his heir at law nor any one claiming under him, ever was known to lay claim to this land, nor any one but

Dennis and his descendants, through the intervening period of forty-six years : that several members of the family, and among others the present heirs at law, stated their understanding always to have been that the patentee had parted with this land to Dennis : that one of the patentee's sons swore that he believed the patentee had made a deed of the land to Dennis, though he did not know it, and that the widow of Dennis' son and devisee had lived on this land from 1836 or 1837, and the defendant claiming through her undisturbed to this time, she having a life estate devised to her in Dennis' property :—that all these facts were sufficient, not to support a legal presumption of a deed, but sufficient to allow the question to be put to the jury, whether they were or were not satisfied that a conveyance had in fact been made ; and that the jury having found in the affirmative, we are not bound to disturb their verdict, though the possession alone that was proved in this case might not be sufficient to have warranted the finding of the jury.

It is a circumstance also that the plaintiffs themselves have lately taken a deed from the heirs of Dennis, meant, no doubt, only to strengthen their title by way of confirmation.

If the title of Dennis can be upheld on the finding of the jury (and it is to be considered whether the evidence did not shew the heirs of Francois actually dispossessed by an uninterrupted possession being held continuously against them since 1836 or 1837, when, for all that appears, Solomon was in this province and of age) it comes next to be considered that, taking Dennis to have died seized, there is then a contest between the plaintiffs, as claiming under the conveyance from the devisees of Richard, who held the title derived from Dennis, and the defendant claiming through the sale made under the *fi. fa.* against the lands of Richard, issued upon the judgment in *Chewett v. Catharine Drouillard*, widow and administratrix with the will annexed of Richard Drouillard. That last mentioned title is prior in date to the conveyance by Richard's daughters to the plaintiff, and will prevail unless there is something to invalidate it.

Then consider the objections taken.—1st. That the administratrix, against whom the judgment is, was not legally

administratrix, though administration with the will annexed had been committed to her by the proper authority, the surrogate judge, because Richard, her husband, had, by the codicil to his will, appointed two executors, one of whom, however, had afterwards died, but the other was not proved to have formally renounced, and was living.

I think the answer to this is, that the administratrix must be regarded as representing the testator rightfully until the administration granted to her is repealed, and that the surrogate, in his letters of administration, specially recites that Alexander Trudelle, the surviving executor named in the will, had renounced.

2ndly. It is objected that the writ against lands issued irregularly on the same day that the *fi. fa.* against goods issued. That objection is answered by the judgment in this court of Doe dem. Spafford v. Brown (3 O. S. 92).

Again, it is objected that the administratrix could not buy under the judgment against herself as administratrix. But I cannot say that she could not confess judgment in an action brought against her as administratrix; nor that on a judgment entered under the confession the testator's lands could not be sold; nor that she was legally disabled from buying.

All these, more or less, furnished grounds of suspicion, because we can easily see how the judgment and execution could be perverted to the prejudice of the heir, if the administratrix designed to defraud him; but all this is not *ipso facto* fraudulent in the view of a court of law. The widow in this case owned a life estate in the property, and had alienated it, and in fact had assumed to convey in fee. She might well, in order to confirm the title which she had given, bid off the land at the sale. The question was whether she did so *bona fide*, and without any fraud practised.

On the whole my opinion is that the verdict for the defendant should not be set aside, though, as I have stated, I have had doubts in regard to more than one of the questions raised.

BURNS, J.—Upon a careful review of the evidence I have arrived at the conclusion there should be a new trial. The

plaintiffs did not rely upon the title from the co-heiresses of Richard Drouillard for any other purpose than to answer the claim set up by the defendants deriving title from the widow of Richard, and the judgment against her as administratrix of the estate of her deceased husband. This may be put out of the question, and the plaintiffs' title, as derived from the heir at law of the patentee of the crown, be considered.

It seems clear enough that the plaintiffs' title must prevail unless the patentee did convey away this particular lot. No deed from him or conveyance of any kind is proved ever to have existed, or ever said to have been executed. That there was a conveyance rests altogether upon opinion, and the belief of certain members of the family of what they supposed to have been the case. The patent to Francis Drouillard issued in 1803, embracing a large tract of land. He died shortly after 1812, leaving Solomon, his eldest son, living, who died not long after. The plaintiffs claim from his eldest son. It appears that the patentee was indebted to his second son, Dennis, in something like £100, for money to assist in building a house on some other land not forming any part of the grant in question, and it is assumed that to pay and discharge that debt the patentee must have conveyed the land in question. That assumption is founded on the fact proved, that the two went away to look at land where Francis Drouillard's grant, consisting of 1200 acres, was situated, and, as it was said, for the old man to put the son in possession; and when they returned the old man said he was now discharged of his debt; and in the family it was understood that the land belonged to Dennis and was called his. From this it was sought to be assumed that the patentee Francis had conveyed to his son, but no one had ever seen a conveyance, and some thought that Dennis' claim was not by a conveyance, but under a will of the old man. Nor could any one say whether he would be entitled to the whole 1200 acres, or only a portion of it. A presumption to support title will only be made in favour of one who shews a beneficial interest in that to which he claims title; and in the case of a presumption which must

have the effect of disinheriting the heir, I take it the evidence should be such as to leave no doubt upon the mind as to the existence at one period of some instrument which would have the effect of cutting out the heir. With regard to the existence of a debt owing by Francis, the father, to Dennis the son, there is no positive testimony that it did exist, except that the father said he was absolved from it. In all probability he did owe him, but whether it was necessary to give the whole 1200 acres to discharge it is not said. Whether the £100 mentioned was New York or Halifax currency is not stated, and we know that the former in those days was the prevailing mode in which the people of the country reckoned money, and whether it were \$250 or \$400 might make a difference in taking the whole tract or only a portion of it to satisfy. There is no evidence that Dennis ever was in possession of any part of the tract. After Dennis died, his sons and a daughter joined in a deed. dated 30th of June, 1834, and thereby made partition of lands, and this particular lot is thereby proposed to be conveyed to James Drouillard, son of Dennis. On the 11th of August, 1834, James by his will devised it to his brother Richard. It appears that both James and Richard died before the year 1836; and we find in that year that Richard's widow, Catharine, with her second husband, Metis, were in possession, and that they in some way transferred to the defendant's father, Thomas Maxwell, who went into possession in 1837, and he continued in possession until he died. Catharine Metis and her husband joined her in giving a confession of judgment in 1856, she doing so as administratrix with the will annexed of her deceased husband Richard Drouillard. It appears that the lands were afterwards sold upon the judgment, and she, by the name of Catharine Drouillard, purchased at sheriff's sale, and the sheriff, on the 5th of October, 1839, executed a deed to her. Such a possession, I apprehend, will not be one to which a presumption would attach that the patentee had conveyed to his son Dennis, from whom Richard derived his claim, or would be sufficient to ouset the claim of the heir at law. It does not appear that Richard ever was in

possession. So far as the facts proved disclose, it appears that Catharine and her husband Metis gave the confession of judgment a year before they took possession of the land: that they transferred to the defendant's father the possession a year afterwards, and before any execution against lands issued, and subsequently conveyed to him in 1840.

I do not think this is a case for any presumption to be made against the title of the heir at law, and I am not satisfied that the jury should find on this evidence that a conveyance had been executed by Francis Drouillard to his son Dennis; and therefore I think there should be a new trial, in order that better evidence may be obtained, if it can be, that in truth the patentee did part with the land to his son Dennis by something more than mere word of mouth, which it seems to me is all that the present evidence amounts to.

MCLEAN, J., concurred in opinion with the Chief Justice.

Rule discharged—*Burns*, J., dissenting.

MAULSON V. TOPPING ET AL.

Assignment in trust for creditors—Provision for release—Effect of fi. fa. before execution by creditors.

An assignment for the benefit of creditors is fraudulent as against non-executing creditors if it exacts a release in full from those who execute.

If the assignee be not a creditor, such assignment is void as against an execution coming in before any creditor has executed.

INTERPLEADER ISSUE, to determine whether goods seized under a *fi. fa.* from this court delivered to the sheriff on the 4th of June, 1858, at the suit of the defendants, Topping & Brown, against Charles Pollock, were at that time the property of this plaintiff, Maulson, as against the said Topping & Brown.

At the trial, at Toronto, before *Draper*, C. J., it appeared that the plaintiffs claimed under an assignment executed on the third of June, 1858, to the plaintiff, for the benefit of Pollock's creditors, who should execute within one month.

It purported to make over to the plaintiff all Pollock's stock in trade, consisting of dry goods and millinery goods, situated in his store and premises in Toronto, described in

the assignment, and all his household furniture in the premises above the store, and all his book debts, notes, bonds, and other securities, and all other his goods and chattels, in trust to sell the same, and to pay, 1st, all expenses of the trust. 2nd. All debts in full not exceeding £25 each. 3rd. To pay salaries and wages of persons employed in winding up the business, or such as were then due by Pollock. 4th. To retain to the assignee five per cent. commission for his services. 5th. To pay rateably Pollock's creditors who should execute within one month of the date, "and agree to accept such dividend as the residue of the estate will yield, in full of their respective debts, and according to the amount thereof respectively, and to pay over the surplus, if any, to the assignor, Pollock, his executors, administrators, &c.

With a proviso that if any creditor of Pollock should neglect, refuse, or decline for one month from the date to execute the assignment, or to accede to the same, he should be excluded from all benefit under the assignment. And this further proviso, "that the several creditors coming in and executing these presents, and taking benefit under the provisions and trusts therein contained, do respectively agree to accept the same in full satisfaction and discharge of their respective claims and demands upon and against the said party of the first part, and do hereby respectively release, discharge, and acquit him for ever of and from the same, and every part thereof, and of and from all actions, suits, demands, and claims in respect thereof."

The assignment was executed by Pollock and the plaintiff Maulson, and had been executed by three creditors only, but was not executed by any creditor till after the execution came. Maulson was not himself a creditor.

It was proved that the assignment was executed at midnight; that the plaintiff and Pollock then went to Pollock's house, when a piece of goods was delivered to the plaintiff, who locked up the premises and took the books away, and Pollock and his people left the house. Pollock had gone to an attorney to get the assignment prepared, after 9 o'clock that evening, and stated to him that he had given a cognovit

to Topping and Brown (these defendants), and that probably an execution would issue next morning. The attorney swore that he advised Pollock to make an assignment for the benefit of all his creditors ; that there were no debts much exceeding £160 besides those to Topping and Brown, and to one McPherson.

Pollock was also examined as a witness. He swore that at the time of the assignment he owed Topping and Brown about £200, and £800 or £900 to McPherson, who succeeded them in business ; and that all his other debts did not exceed £160 : that he had given a cognovit to Topping & Brown nearly a year before the assignment, and they had threatened just before to use it : that he was endeavouring to come to an arrangement with them, as he found he was going behind in business : that they advised him to make an assignment, which he was willing to do, provided it should contain a release to him of the debts of the parties executing. This they declined, and he therefore made this assignment, with a provision in it for a release, making Maulson his trustee, whom he did not before know, even by sight. He admitted that, except to the amount of £150 or £160 which he owed to others, all his goods had been got from Topping and Brown and McPherson ; and he swore that his stock in trade and effects covered by the assignment were worth about £1,300, and his book debts, also assigned, were worth about £250. He had been thirteen months in business ; had left his books with Topping and Brown to shew how his affairs stood, and was to have returned to them at 3 o'clock of the day he made the assignment, but went to an attorney instead, and got this assignment prepared and executed that night. He swore that he thought he did owe Topping and Brown as much as he had given them the confession for.

It was proved by another witness that Pollock had taken his books to Topping and Brown in order that they might make out a schedule, with a view to his making an assignment to them, and that an assignment was actually prepared by an attorney on the 31st of May, with Pollock's knowledge and consent, and a time was fixed for its execution ; but it

never was executed, and, as Pollock swore, because they objected to inserting a clause for release in full by the creditors.

The learned Chief Justice directed the jury to find for the plaintiffs if they thought that Pollock sought only in good faith to provide for the payment of the debts by a *pro rata* division of his assets among his creditors ; but that he had no legal right to insist on a discharge, and therefore, if he made this assignment in order to enforce a discharge in full, and so to deprive Topping and Brown of a portion of their debt, and to get into his own hands the balance that might not be required for the payment of those creditors who should execute the indenture, that would be evidence of fraud, and if they believed it, they should find for the defendants.

A verdict was rendered for the defendants.

Eccles, Q. C., obtained a rule *nisi* for a new trial, on the law and evidence, and for misdirection in charging the jury that the assignment made by Pollock to the plaintiff ought to be held void, on account of a provision contained in it that the creditors who executed it should be considered as releasing the assignor in full, and taking their chance of what they might receive under the trusts.

Cameron, Q. C. (*McBride* with him), shewed cause, citing *Siggers v. Evans*, 5 E. & B. 367.

ROBINSON, C. J.—As to the merits, upon the law and evidence, independently of any strictly legal questions that have been raised, this was such an assignment as I do not think the jury should have upheld. We have here a debtor who has been largely supplied with goods by two creditors, who it appears were his main support, and to whom he owed upwards of £1,100, executed an assignment at midnight of all his effects to a perfect stranger, under pretence of protecting his other creditors, to whom he owed in all not more than £160 ; and he did this avowedly because he expected an execution the next morning at the suit of the creditors to whom he was legally indebted, and indebted, as it seems, for the goods which he was thus putting out of their reach. He had confessed judgment a year before to these same

creditors, who seem not to have been pressing upon him with any severity. He left them, it is true, an option to come in within one month and execute an assignment, by the terms of which, if they had executed it, they must have released their debt in full on the condition of receiving their dividend out of what all the property assigned might produce.

The learned Chief Justice of the Common Pleas told the jury that such an assignment was in his opinion fraudulent as regarded his other creditors, and we have in another case decided this term, of *Wilson v. Kerr et al.* (*a*), intimated our acquiescence in that view, though neither in that case nor in this was it necessary to determine the point, on account of the other objections to which the assignment in each case appeared to be liable. The English authorities are not express upon the point one way or the other, though there are several cases in which assignments containing such releases have been under discussion in English courts, and have been upheld against other objections, without either the counsel or the court adverting particularly to the clause of release. (*b*)

The American cases are conflicting. In some states assignments have been held void as against non-executing creditors on account of a release being exacted from those who should become parties. In others it has been determined not to be a fatal objection (*c*). I confess I think that reason is altogether in favour of those decisions which hold such assignments fraudulent in a legal sense, if it be correct to hold, as has been repeatedly held in England, that an assignment by an insolvent debtor is void if it contains provisions which would subject creditors executing them to be liable as partners in a business which the trustees were directed or authorised by the assignees to carry on, in order to wind up the affairs of the estate more advantageously. But however we might determine this upon fuller discussion in any case which turned exclusively upon that question, we think it clear that in this case the execution was entitled to

(*a*) Ante, page 168. (*b*) See *Holmes v. Love*, 3 B. & C. 244; *Jackson v. Lomas*, 4 T. R. 166; *Owen v. Body*, 5 A. & E. 28; *Rex v. Watson*, 3 Price 6. (*c*) See *Ramsdell v. Singerson*, 2 Gilm. 78; *Howell v. Edgar*, 3 Scam. 417; *Kirne's Law Compendium*, III. 49.

prevail, upon the authority of the case of *Harland v. Binks* (15 Q. B. 713), and *Siggers v. Evans* (5 E. & B. 367), for here it is not pretended that any creditor had executed the deed before the sheriff came with the execution; and Maulson, the assignee, was not himself a creditor, nor had any thing taken place that appeared in evidence by which the relation of trustee and *cesti que* trust can be said to have been created before the sheriff seized. The assignment, therefore, stood at that time as a mere voluntary arrangement made by Pollock for his own convenience, and was still revocable by him at pleasure, and consequently void against a subsequent purchaser for value, or an execution creditor.

I am of opinion that the rule for a new trial must be discharged.

BURNS, J.—This case may be said to resolve itself into two points, *first*, the one stated by the Chief Justice of the Common Pleas at the trial, that the assignor had no right to stipulate, in making an assignment for the benefit of creditors, that they should, upon their taking such assignment release him from other liability, and in case of their not doing so, the proportion of the dividends which would be due to such creditors as should not sign the deed should be paid to the assignor; and, *secondly*, the one taken in answering the plaintiff's application for a new trial, namely, that in this instance the assignee himself took no beneficial interest in the property assigned, and until creditors assented to the deed it was revocable, and the execution of the defendants being placed in the hands of the sheriff before any creditors could assent, the assignment could not cut out the execution.

I entirely agree with the view of the Chief Justice of the Common Pleas, that a person who is making an assignment for the benefit of creditors has no right to dictate terms to them whereby he is to derive a benefit or advantage to himself. He may make an assignment for the payment of some creditors, to the exclusion of others, provided that the property assigned is not more than sufficient to pay those creditors. He may also prefer some creditors to be paid their debts in full to other creditors. In all these cases the ques-

tion always is, whether in point of fact the debtor has honestly surrendered his property for the benefit of creditors and payment of the debts of the assignor as specified; but if there be any secret trust, benefit or advantage, to be derived from it by the debtor, then the transaction is fraudulent as against those creditors who do not agree to it. Here it seems the assignor, independent of the debt due the defendants, owed very little in comparison to the value of the goods, and the object, therefore, was manifest, to compel the defendant to take the goods and release the assignor from the debt. A great benefit and advantage was thereby to be gained by the debtor, if the defendant accepted that assignment. It would seem that the debts which the assignor owed, independent of that due the defendant, were so small, that it would never do to leave the proceeds in the hands of the assignee beyond the dividends on those small demands, and therefore the deed provides for payment to the debtor of the dividends or proceeds of the stock of all those creditors who refuse to sign the deed. These advantages are to be derived by the assignor that I do not think he has any right to stipulate for, and when he does stipulate for such advantages, I think that should be treated as a badge of fraud, and therefore quite agree with the direction given to the jury upon that point.

The second point seems to me to admit of no doubt, since the decision of *Siggers v. Evans* (5 E. & B. 367.) The plaintiff in this case was not a creditor of the assignor, and had no interest whatever in the debtor making an assignment of his stock-in-trade. In the previous cases it seems there was from time to time a difference of opinion, whether there should be an actual assent of some creditor, by his signing the deed, or whether the communication to the creditor would not be sufficient to sustain the assignment. It is not necessary to go into that point in the present instance. The evidence shews clearly that the plaintiff, up to the moment of the execution coming into the hands of the sheriff, and a levy made, stood in the mere light of a mandatory, and up to the very moment the sheriff entered, the assignment could be looked on in no other light than that of a

voluntary transfer, the trust property to be applied for the benefit of the volunteer, and therefore revocable by the execution taking precedence. The execution creditor does not seek to disturb the order of payment of the debts of the debtor, for as not one creditor had signified his assent to be paid as provided for, there was as yet no order of payment of the debtor's debts established. The case, therefore, is as free from any of the difficulties arising from difference of opinion as to the time when creditors may be said to have assented as a case well can be. I think the rule for a new trial must be discharged.

McLean, J., concurred.

Rule discharged.

MANN AND HOBSON V. THE WESTERN ASSURANCE COMPANY.

Insurance—Notice, certificate, and affidavit of loss.

One of the conditions in a policy required that the assured should "give immediate notice of any loss or damage by fire, within fourteen days, to the agent of the Company," and as soon after as possible should deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation, and should also declare on oath or affirmation * * in what manner the buildings were occupied at the loss, and who were the occupants. That they should also produce a certificate under the hand and seal of a magistrate most contiguous to the place of the fire, that he had examined the circumstances, and believed the claimant had without fraud sustained loss to the amount which the magistrate should certify: and until such proofs, declarations and certificates were produced, the loss should not be payable.

A fire occurred on the 3rd of July; on the 7th, one of the plaintiffs signed a written notice to defendants (set out below), stating the destruction of the mill: that its whole value was \$2,400, and that there was no other insurance; at the foot of which was a certificate, under the hand and seal of a J. P., stating that he had examined several persons on oath in the matter, &c., and that he believed that the assured had, without fraud, sustained loss by the fire "to the amount of his insurance and over."

On the 10th, one of the plaintiffs received a note from defendants' agent, to say that the papers sent were not in compliance with the policy; and on the 20th, the following notice was sent to him, signed by the plaintiffs:—"Gentlemen,—We hereby notify you that a fire occurred on our premises, on the night of the 3rd of July, by which the following property was destroyed: to wit, a saw-mill, whole value, \$2,400. We have not had any other insurance effected on said saw-mill. The above named sum is the whole value of the subject insured. The property is owned by us. The building was used as a saw-mill only," &c., (adding a short statement of the circumstances attending the fire). At the foot was written, "Sworn and affirmed before me, at Galt, this 14th of July, 1858. (Signed.) Theophilus Sampson, J. P.; and under-

neath the same justice certified that he had made enquiries, and believed the facts set forth, and that the plaintiffs had, without fraud, sustained loss to the amount therein mentioned. This was not under his seal.

The defendants, by their plea, denied the loss, in the usual form, and under it desired to shew that the building had been designedly set fire to. *Held*, that this evidence was rightly rejected, and that an application to add such a plea at the trial was properly refused.

Held, also, *McLean*, J., dissenting, that the plaintiffs could not recover, for the condition of the policy above mentioned had not been complied with.

As to the particular objections taken,—

Held, 1. That the certificate, and affidavit were in time; and that it was unnecessary that the notice or affidavit should be given or made by all the owners of the property insured. *Semble*, that a notice given within fourteen days would be sufficient.

Per *Robinson*, C. J., that the paper sent on the 20th was insufficient, for it could not be treated as an affidavit of the truth of the statement as to the loss, or of any thing more than the notice was given. *Burns*, J. dubitante; but *held*, that the omission to state what persons occupied the building at the time of the loss was fatal.

3. *Semble*, that the defect in the jurat, in not stating which of the plaintiffs were sworn and which affirmed, would not have been fatal.

4. That both certificates were insufficient, for not stating specifically the amount of the loss; and the second certificate for want of a seal.

ACTION on a policy of insurance against fire, on a saw-mill, for £250.

On the 3rd of July the saw-mill was totally destroyed by fire.

The plaintiffs averred in their declaration that they had complied with the conditions of the policy, in regard to giving notice and proof of the loss, and all other conditions.

The defendants pleaded, among other pleas, that the plaintiffs had not produced to them the proofs, declarations and certificates required by the ninth condition indorsed upon the said policy of assurance, without which proofs, declarations and certificates, the said loss, if any there be to the said plaintiffs, was not payable by the defendants."

The plaintiffs joined issue upon that plea.

The ninth condition in the policy required that all persons assured "are to give immediate notice of any loss or damage by fire, *within fourteen days*, to the agent of the Company, should there be one in the neighbourhood, &c., and as soon after as possible are to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation: that they shall also declare on oath or affirmation whether any and what other assurance has been made on the same property; what was the whole value of the subject assured, and what their interest

therein ; in what general manner, as to trade, manufactory, merchandize, or otherwise, the building assured and the several parts thereof were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know or believe. They shall also produce a certificate under the hand and seal of a magistrate, or notary public, most contiguous to the place of the fire, and not concerned in the loss, stating that he has examined the circumstances attending the fire, loss, or damage alleged, and that he is acquainted with the character and circumstances of the claimant, and verily believes that he, she, or they, have by misfortune, and without fraud or evil practice, sustained loss and damage in the subject assured, to the amount which the magistrate shall certify. And until such proofs, declarations, and certificates are produced, the loss shall not be payable."

The fire having occurred on the 3rd of July, 1858, on the 7th of July Mann, one of the plaintiffs, signed a notice addressed to the defendants in these words, "I hereby beg to notify you that a fire occurred on my premises on the night of Saturday the 3rd of July, which destroyed the saw-mill insured in your office. The wood-work of the mill is almost a complete ruin. Its whole value is estimated at 2,400 dollars. No other insurance. (Signed). Frederick Mann."

At the foot of this was a certificate, signed and sealed by Theophilus Sampson, J. P., which was in these words, "I, Theophilus Sampson, of the town of Galt, having examined several parties on oath in the above case between the Western Insurance Company and Frederick Mann, which will be found in another copy delivered to Louis Dasseaur, your agent in Galt ; and, further, I have to say that I am not concerned in the said loss in any way ; that I am not related to the insured ; that I am well acquainted with the character of the insured, and consider it good, and from what I can learn regarding his circumstances I consider him solvent ; and that I believe that he by misfortune, and without fraud or evil practice, hath sustained by such fire loss and damage, *to the amount of his insurance* and over. Given under my

hand and seal, this ninth day of July, 1858, at Galt, in the county of Waterloo. (Signed,) Theophilus Sampson, J. P." [L.S.]

On the 10th of July, 1858, Mann received a note from the agency office of the defendants in Galt, near which the mill was, in these words, "In order that you may avail yourself of the advantage of your policy, if entitled to the same, I beg to notify you that the papers received by Mr. Dasseaur, insurance agent, addressed to him through the post-office, Galt, are not in compliance with the conditions of your policy. You will therefore govern yourself accordingly."

On the 20th of July the agent of defendants at Galt received the following notice, signed by both the plaintiffs:

"Gentlemen,—We hereby notify you that a fire occurred on our premises, on the night of Saturday, the 3rd of July, by which the following property was destroyed: to wit, a saw-mill, whole value 2,400 dollars. We have not had any other insurance effected on said saw-mill. The above-named sum is the whole value of the subject insured. The property is owned by us. The building was used as a saw-mill only. The fire was first observed between eleven and twelve o'clock on the night in question, and when first seen flames were issuing from the roof of the building. The above is a correct statement of the matter, so far as we know and believe. (Signed.) Frederick Mann, Benjamin Hobson."

At the foot was written, "Sworn and affirmed before me, at Galt, the 14th day of July, 1858. (Signed.) Theophilus Sampson, J. P."

And underneath this was written, "I, Theophilus Sampson, the aforesaid justice of the peace, do certify that I am not concerned in the loss of Mann and Hobson, as a creditor (or otherwise), or related to the said Mann and Hobson; that I am acquainted with the character and circumstances of said Mann and Hobson, and have made diligent enquiries as to the facts set forth in their statements, and verily believe that they really, and by misfortune, and without fraud or evil practice, have sustained by such fire loss and damage to the amount therein mentioned. (Signed.) Theophilus Sampson, J. P." (But without any seal.)

This latter notice, affidavit, and certificate, appeared to have been received by the agent on the 20th of July.

There was a plea traversing the alleged loss in the usual terms : "The defendants say that the said property by the defendants insured was not, nor was any part thereof, burnt, consumed, or destroyed by fire as alleged, nor did the said fire or loss happen in manner and form as alleged."

At the trial, at Berlin, before *Robinson, C. J.*, the defendants desired to give evidence, under that plea, that the building had been designedly and fraudulently set fire to by the said plaintiffs ; but the learned Chief Justice rejected it, and declined to allow the defendants, during the trial, to put such a plea upon the record.

The defendants' counsel offered the plaintiffs to waive objections which he had taken to the sufficiency of the notice and proofs of the fire, if the plaintiffs would consent to the addition of the plea, but that was declined.

The defendants' counsel then objected to the sufficiency of the evidence to prove a compliance by the plaintiffs with the ninth condition of the policy, because the magistrate's certificate was not under his seal, and though the certificate sent with the first notice was under seal, yet that did not state all that was necessary, and there was no affidavit accompanying that first notice. And that the affidavit sent with the second notice was insufficient, it being stated to have been "sworn and affirmed," and it was not stated that the parties were severally sworn, or both sworn, or which was sworn and which affirmed ; nor that the justice certifying was the nearest justice, nor that he was a justice residing within the jurisdiction. That the first notice was signed by only one of the assured, and the property was spoken of as *his*, whereas it was insured by two persons, and belonged to two.

The learned Chief Justice overruled these objections at the trial, leaving them to be renewed in term.

J. Duggan, for defendants, moved for a new trial, on the grounds that they were taken by surprise, by not being allowed under the pleadings to go into evidence that the fire was wilfully set to the building by the plaintiffs or by

their procurement; for the rejection of evidence, and for the verdict being contrary to law and evidence. On the argument he abandoned that portion of the rule which referred to misdirection, but contended that the plaintiffs had not furnished sufficient proof of loss, as required by the terms of the policy, to entitle them to recover. He objected that the first notice, dated 7th of July, was insufficient, being signed only by one of the plaintiffs, and the loss being therein referred to as *his* loss, and not as the loss of himself and Hobson, and no affidavit accompanying it; and as to the second notice, dated 14th of July, and marked on the back as having been received on the 20th, it was contended *that* was too late, not being within fourteen days, as required by the condition of the policy; and the objection was again renewed as to the informality of the jurat. He cited *McFaul v. The Montreal Inland Ins. Co.*, 2 U. C. R. 59; *Alderman v. West of Scotland Ins. Co.*, 5 O. S. 37; *Hatton v. The Provincial Ins. Co.*, 7 C. P. 555; *CinquMars v. The Equitable Ins. Co.*, 15 U. C. R. 143.

Read and *M. C. Cameron*, for the plaintiffs, contended that the notice of the 7th of July, though only signed by one of the plaintiffs, was sufficient notice of loss within fourteen days after it occurred, as required by the policy; and that it was sufficient to deliver in a particular account of the loss or damage, signed by the plaintiffs, and verified by their oaths or affirmations, as soon after giving such notice as possible, no specified time being stated for delivering in such particular account. That the policy requiring an oath or affirmation of the correctness of such account required an oath to be taken which the law could not recognise, and which was extra-judicial and contrary to public policy, and therefore that the plaintiffs were not under any necessity to furnish such affidavits to entitle them to recover.

ROBINSON, C. J.—In this case the good sense of a remark made by Mr. Justice Lawrence, in *Worsley v. Wood* (6 T. R. 722) is strongly illustrated.

The question there turned upon the necessity, under such a condition in a policy as is now in question, for producing

the certificate required by the policy in regard to the loss. The learned judge remarked : " It is a duty the office owes to the public, as well as to themselves, to take every precaution to protect them against fraud ; " and when we see how imperfectly the condition has been complied with in this case, and the objections which have been taken in consequence to the plaintiffs' recovery, we must agree in the wish intimated by a learned writer on fire insurance " that it may, some time or other, be thought advisable for all the insurance companies to agree among themselves to have this article respecting the notice and proofs of loss revised, and put into a more unexceptionable form, and to adopt it universally."—(Marsh. on Ins. 705 ; Angell on Ins. 255). If that were done there might be forms of the notice, affidavits, and certificates published, that would suit all such policies, and the assured, who has not always the policy in his possession, and may not have professional advisers at hand, might be able to prepare and send in the necessary papers, without incurring the risk of losing the benefit of the policy by coming short in some particular of what its conditions require.

The expression in the 9th condition, that the assured, after a loss has happened, shall give *immediate* notice of the loss, within *fourteen* days, shews that this condition has not been duly considered, for if *immediate* means the same thing as within fourteen days, there was no necessity for using both terms, and if they mean different things then the one is in opposition to the other.

We may take it, I think, that under the language used the Company consent to take a notice within fourteen days as sufficiently early, though where there was no reason for not giving more immediate notice, and if there were no waiver as to time, there might be a question on that point.

Now here notice was given of the loss by fire within fourteen days, namely, the first notice, to which the agent no doubt referred in his letter of the 10th, in which letter he warned the assured that his papers were not sufficient.

That was sufficient notice of the mill being burnt to enable the agent to commence enquiring into the circumstances, and it came in time, I think, being much within

fourteen days ; at any rate the agent did not object that it did not come soon enough.

There is therefore no difficulty in the plaintiffs' way, so far as mere notice of the loss is concerned, and the condition does not require that the affidavit stating particulars of the loss and the certificate are to accompany the notice. It says, as soon after as may be possible, by which I think is meant as soon as may be possible after giving the notice, and considering the circumstances which may have produced delay, for by the notice the insurers are put in a situation to commence an enquiry for themselves. The only question as to time, therefore, of sending in the affidavit and the certificate in any such case, will be whether the assured has forwarded them within a reasonable time after the notice, considering all the circumstances. It is not necessary, I think, that the notice or the affidavit should be given or made by all the owners of the property insured. The words that "*all persons* assured are to give notice," do not mean more than that this is a general condition incumbent upon all persons assured ; but a notice by one on behalf of all is, I think, sufficient, and so of the affidavit.

Then as to the time of furnishing the affidavit, it must be done within a reasonable time after the notice ; and until it is furnished the assured cannot recover. I do not think any difficulty arises in this case as to the time of furnishing the affidavit of the assured. But were its contents sufficient, and was it in other respects an affidavit admissible under the statute?

There is but one affidavit of the assured that can be properly called an affidavit, which was received by the agent on the 20th of July. None seems to have been made before, and this paper, on which the assured rely as being a sufficient affidavit, seems to have been intended to answer the double purpose of a notice and affidavit.

I regret to say that I think we cannot accept this as an affidavit sufficient under the statute. There are no words in it by which the assured declare themselves to make oath to the truth of any statement contained in the paper, in regard to the loss. The paper begins as a mere notice, thus : "Gentlemen,—We hereby notify you that," &c. Saying at

the end of such a paper, "sworn and affirmed before me," &c., does not necessarily mean anything more than that the persons swore and affirmed that they gave the notice, unless the last two lines can be taken fairly to amount to an affidavit of the truth of the facts stated.

Then it does not appear which of the two swore, and which of the two affirmed, or whether both of them were in some way, either by oath or affirmation, bound to the truth of the statement.

It states indistinctly, but perhaps sufficiently, whether the building was totally destroyed or not; but it does not contain any statement as to what persons occupied it at the time of the loss, though the condition expressly requires that it should contain such a statement.

The certificate, I think, must be sealed, because the condition requires it, and till such a certificate is produced the assured is not in a situation to bring his action. The first certificate given by the justice had his seal to it, the other had not. We must see therefore whether the first states all that is required. It seems to me to do so, except that the magistrate does not certify the amount of the loss: that is, he names no sum, but says he believes the assured sustained loss to the amount of the insurance, and over. Now that, I think, is not what the condition requires. The sum should be named in the certificate, for questions might arise, when the sum is not otherwise named than by reference to the insurance, as to what sum it did really cover; and besides, how did the justice know the sum insured? He does not say that he saw the policy, or had any other knowledge of the sum insured but what the insured told him.

I think a justice of the peace can properly swear a person to such an affidavit, and that he need not state on the face of it that he was a magistrate most contiguous to the fire, but it may be proved *aliunde* that the fact was so.

Upon the whole, in my opinion the notice of the fire was sufficient, but the affidavit and certificate insufficient, to enable the plaintiffs to recover under the ninth condition, wherefore the rule must be made absolute for a new trial.

The case was argued on the return of the rule as if the

application had been for a nonsuit, but no leave was reserved to move for a nonsuit, and at the trial the objections were simply overruled by the defendants' counsel being told that he could of course move against the verdict if it should be in the plaintiffs' favour.

This seems to have been understood, for the rule *nisi* that has been taken out and served makes no mention of a nonsuit.

The rule for a new trial must therefore be made absolute, and without costs.

The defendants' counsel may think it judicious and fair to propose now what he has before offered to do : namely, to waive all objections to the preliminary proof, &c., if the plaintiffs will consent to allow a plea to be added, setting up the substantial defence which it is said was intended ; or if leave to add such a plea is applied for, the court can make it a condition that the other objections shall be waived. If the plaintiffs prefer it they may have a nonsuit entered, and they may have it in their power to free their case from some of the exceptions which have been taken to their preliminary statement and proofs of loss, in case it can be held that they are not necessary to be delivered within a certain time, but merely before action brought, or at all events, without any very unreasonable delay.

MCLEAN, J.—Upon the evidence no question could arise as to the plaintiffs' right to recover on any of the issues, except that to the fourth plea, which required testimony on the part of the plaintiffs that they had furnished to the defendants the proofs, declarations, and certificates required by the ninth condition of the policy of assurance. The defence rests entirely upon that plea, and it must be admitted that the plaintiffs have been extremely careless in the manner in which they have attempted to furnish the proofs, without which the loss is declared not to be payable. The ninth condition require *all persons* assured by the defendants, and sustaining loss or damage by fire, to give immediate notice thereof *within fourteen days*. Did the plaintiffs give such notice ? If they have not, then their own neglect must pre-

vent their recovery. That notice might be in any form, so that it conveyed to the defendants within fourteen days the information of a loss having occurred as to the property insured, and there is nothing to require it to be given on oath. The particular account of loss or damage to be *afterwards delivered*, and several other matters, are required to be on oath, but there is no specific time within which any of them must be delivered, the only requirement on that head being that the particular account of loss or damage shall be delivered as soon *as possible after* the notice of such loss, which may be taken to mean as soon as may be, as expressed in some policies, or as soon as it can conveniently be done. By the 15th condition, indorsed on the policy, which forms apart of the contract, all actions must be brought within twelve months next after the cause of action shall accrue, and if the notice of loss be given within fourteen days, and the particular account of loss as soon as possible after that, all other documents required may be furnished at any time, so as to admit of an action being brought within twelve months.

The notice of the 7th of July, received by defendants on the 9th, is objected to as insufficient, being only signed by Mann, one of the plaintiffs, but it appears to me to be sufficient notice of the loss sustained, though the property is spoken of as that of Mann, by whom the notice is given. The defendants were evidently aware from it, as well as the magistrate's certificate under seal, to what particular loss they referred, for on the next day after their receipt, Mr. *Miller*, on behalf of defendants' agent, wrote to Mann acknowledging their reception, but stating that they were not according to the *condition* of the policy, which he styled *your policy* in two places in the same communication. It is, I think, evident that the notice and the accompanying certificate under seal of the magistrate, referred to the burning of the saw-mill mentioned in the policy on which this action is brought, and that they were so understood by the defendants' agent at Galt, though he gave notice that they were not in compliance with the condition of the policy. If the notice of one of the proprietors was sufficient to apprise

the defendants' agent of the destruction by fire of the saw-mill insured in the policy sued on, and the certificate of the justice of the peace relating to the same property, such as was contemplated by the condition of the policy, I think we may hold that the plaintiffs have substantially, though not in strict form, complied so far with the condition of the policy.

Then as to the particular notice of loss required, it appears to me that the notice sworn on the 14th of July, and said to have been received on the 20th, ought to be held sufficient, and given within a reasonable time. It has not been objected to in point of form, though it is in some respects liable to objection as an affidavit of particulars of demand. There is no evidence, beyond an endorsement on the back of that notice, when it was received by defendants' agent at Galt. It is sworn on the 14th of July, and if delivered by the 17th would be within the fourteen days; but if not delivered till the 20th, the lapse of ten days between the first notice of loss, and the delivery of the *particulars* of such loss verified on oath, ought not to be considered an unreasonable delay, or such as, according to a fair construction of the terms of the condition of the policy, ought to bar the plaintiffs' recovery. In the cases of *Alderman v. West of Scotland Insurance Company* (5 O. S. 59), and *McCaul v. Montreal Inland Insurance Company* (2 U. C. R. 59), it was held that the proof of loss by affidavits, as required by a condition of the several policies, was indispensable, as the performance of a condition precedent by the several plaintiffs, without which the money in either case was not payable. That point being established in these cases, the same objection, if well founded, would avail the defendants in this case; but proof on affidavit was in fact furnished on the 14th of July, or on the 20th, as the defendants admit, and the action was not brought till the 30th of September, more than sixty days after all the required proofs and notices had been delivered in to the defendants. It is alleged that, under the circumstances, these technical objections would not have been urged by the defendants if there had not been some strong grounds to suspect that a fraud had been practised, and indeed on the trial the defendants' counsel moved for

leave to enter a plea upon the record imputing such fraud to the plaintiffs ; but if such a defence was available it should have been pleaded in the first instance, and then the plaintiffs must have been prepared to meet it, or must have failed in their suit if the fraud were established against them. The application to enter such a plea on the record during the trial was properly rejected, as the plaintiffs could not be expected to be prepared to meet an accusation of so grave a nature without a reasonable notice.

After much consideration, I have come to the conclusion that the notice of the 7th of July, though only signed by one of the plaintiffs, was a sufficient notice of loss, and that the certificate under seal of the magistrate, of the same date, is also sufficient, and that the affidavit and affirmation of the 14th of July, completed the proof required by the 9th condition of the policy ; and under these circumstances that the rule should be discharged.

BURNS, J.—The plaintiffs' papers, intended to comply with the conditions of the policy, certainly have been got up in a most slovenly manner. Some of them I think will do, but others I think do not comply with what is required.

The first notice of the fire seems to have been given to the agent of the company on the 7th of July, and on the 10th the plaintiffs were informed that the notice did not comply with the conditions of the policy, but in what respects they were not told. Upon looking at the ninth condition it is clear that the notice of the fire need not be accompanied by the affidavit and account of the loss or damage, for this last may, as the ninth condition says, be delivered as soon after as possible. The notice of fire is to be given immediately ; but as the condition says within fourteen days, by which I understand the term *immediate* is to be limited to the fourteen days, the only question upon this notice is, whether being signed by one of the plaintiffs, describing the property as his, is sufficient. I see nothing in the condition which requires the notice of the fire to be signed by both insurers, or indeed that the notice is required to be signed at all. There is nothing to prevent a verbal

notice being given. The object of requiring notice of the fire within fourteen days no doubt was that the company might as soon as possible be enabled to make enquiries respecting the fire, while the matter was fresh. The saw-mill was the property of the one who gave the notice, though not his solely, and the notice tells the Company that it was the mill insured with them, so there was no misunderstanding as to what was meant. This notice is accompanied by a certificate of a justice under his seal, and so far I think that might be resorted to to sustain the plaintiffs' claim, if all else were right.

A second notice was given, but that does not appear to have been received till the 20th of July, which, as a notice, would be too late, but I think the previous notice sufficient. The question with respect to this second notice is, whether that complies with the ninth condition, as being an affidavit and particular account of the loss or damage, for the plaintiffs seem to have intended this paper to be a compliance with all that the ninth condition calls for. The first question is, whether in point of fact this paper is either an affidavit or an affirmation. It does not begin by telling us that either of the persons deposed to the truth of what is stated, for it begins as a notice to the Company of certain things, and it may be that the parties were sworn and affirmed that notice of the contents of the paper was given. An objection is taken to this, that the justice does not say which of the persons was sworn or which affirmed. I do not think that objection would be fatal. Affidavits of this nature, not taken in the course of legal proceedings or in the administration of justice, are not to be construed with technicality. The object in view by the Company, in requiring the proof of loss or damage in that mode, and stipulating that until such proofs, declarations and certificates are produced, the loss shall not be payable, was to guard themselves against imposition. They wished as reliable information from the person insured as could be obtained. I observe the court of Common Pleas, in *Moyer v. Davidson* (7 C. P. 521), upon an affidavit annexed to a chattel mortgage under the Chattel Mortgage Act, sworn in the same manner in that

respect, considered that it might be received. Then, assuming it might be treated as being both sworn and affirmed—that is, that each of them were—the question is still whether it is an affidavit or affirmation of the matters stated, or only that they gave notice of those matters. I have had much doubt about it, but if the case rested upon that, I should be inclined to give the plaintiffs the benefit of the doubt.

Suppose, then, it be treated as an affidavit to comply with the terms of the condition, the next question is whether it does comply, and here I think the plaintiffs must fail. The condition says the oath or affirmation must state, in addition to other things required, who were the occupants at the time of the fire. There is not the slightest information given upon this point. We see by the policy that the plaintiffs were the occupiers at the time the policy was effected. We see, also, that if the property insured is occupied in any different manner than at the time of effecting the insurance, notice must be given, or the policy would become void. It seems to me a very important point of information for the Company to know whether there had been any change of occupants, to enable them to make enquiry whether any thing had been done to increase the risk. If the plaintiffs were still the occupiers at the time of the fire, as they were when the policy was effected, they might very easily have said there had been no change of occupants. It seems to me the affidavit or affirmation is defective in this point; and it is a condition precedent, before an action can be maintained, that such information should be given in the manner required.

Another condition precedent to the plaintiffs bringing an action is, that the assured shall produce a certificate under the hand and seal of a magistrate or notary public, that the assured has sustained loss and damage on the subject assured *to the amount which the magistrate shall certify*. Now here the magistrate does not name any amount, but says the plaintiffs have sustained loss to the amount insured and more. It may have been that the mill was insured in other offices, and the certificate would apply to the whole. What was meant undoubtedly was, that the Company should have

the information of a magistrate or notary what his opinion was of the value of the loss, without reference to the insurance. That information was very important, for if there were other insurances, the total value of the property destroyed, or the actual loss upon it, would be an ingredient in adjusting the payment, as also an important ingredient to ascertain whether there had been an over insurance or not. It is true in this case the insured has stated there were no other insurances, but will that dispense with the necessity of the certificate of the magistrate stating what the amount of the loss was, or will it do to state that it was over the amount insured? I do not think it will. I think the defendants, as they have stipulated for before they can be sued, are entitled to have a certificate furnished to them by the plaintiffs, that in the opinion of a magistrate or notary the loss or damage sustained on the saw-mill is of some *specific amount*, and it will not do to state it generally to be to the amount insured or over it.

It does not seem that any leave was reserved to enter a nonsuit, and therefore there should be a new trial.

Rule absolute, *McLean*, J., dissenting.

IN RE ISAAC AND THE MUNICIPALITY OF EUPHRASIA.

By-law—Alteration of school sections.

Held, affirming *Ness and The Municipality of Saltfleet*, 13 U. C. R. 408. that to alter the boundaries of a school section within a township, not being a union section, it is only necessary that the alteration shall not go into effect before the 25th of December following, and that it must appear to the municipality that all parties affected have had due notice.

Held, also, that notice in this case was sufficiently shewn.

Duggan obtained a rule to shew cause why the by-law of this municipality, (No. 67,) passed on the 30th of April, 1858, should not be quashed, on the ground that it was passed illegally, contrary to the statute 13 & 14 Vic., ch. 48, being a by-law for altering school section No. 5, without giving notice to the parties to be affected by such alteration, and without the request or assent of the majority of the freeholders and householders of such section, expressed at a public meeting called by the trustees for that purpose, and against the will of the said freeholders and householders.

The by-law enacted that school section No. 5, from and after the 25th of December next, should contain no more width in its limits than ten lots on the third and second concessions, ten lots in each, namely, from lot 20 to the town line of St. Vincent ; and any thing in any by-law or by-laws contrary to the provisions of this by-law was thereby repealed ; and that the town clerk should forthwith notify the trustees of school section No. 5, of the change in said section. The objections taken to this by-law were verified by affidavit.

James Kerr made affidavit that he had resided eleven years in the township of Euphrasia, and was a ratepayer in school section No. 5, which was first constituted by a by-law passed in 1856 ; and in July, 1857, a new school-house was completed in the section, at a place unanimously approved of by the ratepayers of the section, at a meeting called for that purpose : that the alteration made in April, 1858, in the limits of the section, was very inconvenient to a number of the ratepayers : that the said by-law struck off one-third of the territory from the section as before constituted, and made no provision for the part thus struck off, and did not clearly define the limits as newly appointed : that the alteration was never submitted to a meeting of the ratepayers of the section called for that or any other purpose : that it was never submitted to a meeting of the ratepayers of the township of Euphrasia ; that it was not prayed for or required by any neighboring section, and that a number of the ratepayers were not aware of any intention to pass it : that if the alteration was maintained according to the by-law 67, it would make it necessary to put up another school-house, and the one lately built would be of no use as a school-house. And the affidavit pointed out other inconveniences in the arrangement made by the new by-law.

On the part of the municipality, two affidavits were filed, made by resident freeholders of the school section No. 5, as formerly constituted, setting forth that they knew all of the resident freeholders and householders of the said section : that before the 30th of April, 1858, and before the passing of the by-law 67, a petition was carried through the section No. 5, and signed by a large majority of the said freeholders

and householders resident there, and presented to the municipal council, praying that the said school section No. 5 might be altered, as it afterwards was altered by the by-law now complained of: that before by-law 67 was passed, due and proper notice of the said petition, and of its nature and purport, and of the meeting thereafter mentioned, was given to the resident freeholders and householders of the said section: that in pursuance of the notice, and previous to the passing of the by-law, the petition was submitted to and approved of by a special school meeting of the said freeholders and householders of the said section; and that the by-law was passed at the request, and upon the petition, and pursuant to the wishes and desires of a majority of the resident freeholders and householders of the said section No. 5, as it originally stood.

Eccles, Q. C., shewed cause. The authorities referred to are cited in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

We have had several cases in this court in which the steps necessary to be taken by a municipality altering the boundaries of a school section, have come under consideration. The case cited by Mr. Eccles, of Ness and the Municipality of Saltfleet (13 U. C. R. 408), bears more than any of the others on the facts of this case. The cases of Ley and the Municipality of Clarke (Ib. 533), Gill v. Jackson et al. (14 U. C. R. 119), and another case reported in the same volume, *In re Trustees of Hollowell, and Storm* (Ib. 541), brought the same provisions of the School Act under review.

I am of the opinion which I expressed in Ness's case (13 U. C. R. 415), that in order to make an alteration of the boundaries of a school section within a township merely, as in this case, not being a union school section, nothing more is necessary than that the alteration shall be so made as not to go into effect before the 25th of December following the change, and that it must appear clearly to the municipality which passes the by-law, that all parties affected by such alteration have been duly notified of the intention to make it.

It was not necessary, I think, that the ratepayers should have first petitioned for an alteration of the kind, or that there should have been any request of a majority of the freeholders and householders expressed at a public meeting.

The only other objection taken is, that there was not some notice to the freeholders of the section of an intention to make the change. Upon reading the affidavits filed in answer to the rule, we think there is no proper ground for our interference on account of want of notice in this case whatever we might have it in our power to do, when no reasonable notice was given or received at all.

As to the school house being now useless, the statute makes provision for its sale.

Rule discharged.

BANK OF MONTREAL V. DOUGLAS.

Promissory note—Confession—Merger.

A cognovit, payable immediately, given by the maker of a note before it falls due, and judgment entered upon it and registered, forms no defence for the endorser.

Action on a promissory note, made by one James Watson on the 11th of June, 1858, payable to defendant or order, for \$4000, and by defendant endorsed to the plaintiffs.

Defendant pleaded 1st—that he endorsed the said note in the declaration mentioned for the accommodation of the said James Watson, and that there was no value or consideration from the said James Watson, or from the plaintiffs to the defendant for the payment of the amount of the said note, or any part thereof; that after the said note had been so made and endorsed, and before the same had become due or payable, and while the plaintiffs were the holders of the same, and before any breach, either by the said James Watson or the defendant, of the promise in the first count mentioned, it was agreed by and between the plaintiffs and the said James Watson, at the request of the plaintiffs, that the said James Watson should then make and execute a confession of judgment in a certain action to be brought, in which the now plaintiffs should be plaintiffs, and the said James Watson should be defendant, for £3000 damages, pay-

able forthwith thereafter, for the sum of £2,950, being the true debt in the said action, and that the amount of the said note shall be included in and form a part of the said damages, and that judgment and execution might and should be entered up and issued thereon forthwith against the said James Watson for the said sum of £2,950, and costs, officers' fees, sheriff's poundages, costs of levying, costs of copy of cognovit, and a certificate of said judgment: that afterwards, and while the plaintiffs were the holders of such note, and after such endorsement thereof of the defendant, and before the said note became due and payable, and before any breach either by the defendant or the said James Watson, the said James Watson, in pursuance of said agreement, made and executed to the plaintiffs in writing, and the plaintiffs received from the said James Watson, such confession of judgment, in the manner and form aforesaid, for such sum of £3,000, in which the said promissory note was included, and of which the said promissory note formed a part; and the said plaintiffs took and accepted from the said James Watson the said confession of judgment and the judgment hereinafter mentioned, for and in respect (among other moneys) of the amount of the said note; and thereupon afterwards, and after such endorsement, and before the said note became due or payable, and being such holders, and before any breach of the said promise, on the 27th of August, 1858, such proceedings were afterwards had and taken in such suit by the plaintiffs against the said James Watson, that the plaintiffs, by the judgment and consideration of the Court of Common Pleas for Upper Canada at Toronto (the same being the court in which the said confession was given as aforesaid) recovered against the said James Watson in the said action the said sum of £3,000 for their damages which they had sustained by reason of the non-payment by the said James Watson to the plaintiffs of the said sum of money, and also £4 7s. 11d. for their costs in that behalf, whereof the said James Watson was and is convicted, as appears of record in the said Court of Common Pleas, and which judgment is in full force and unreserved; and the defendant further says, that the said

sum of £2,950 in the said confession of judgment mentioned was and formed a part of the said £3,000 damages aforesaid, and that the amount of the note in the declaration mentioned then was, and is, and forms a part of the said sum of £3,000, the damages aforesaid, and the sum of £2,950, the true debt aforesaid, and that £1,000, parcel of the said sum of £3,000 and £2,950, is the same identical sum of money with the said sum of £1,000 in the declaration mentioned, by means whereof the defendant became discharged, before any breach of his said promise, from the performance thereof.

2. That the said note was made and endorsed in the manner and for the purpose in the first plea mentioned, and for no other, and all and singular the matters and things in the said first plea mentioned had been done and performed in the manner therein set forth ; and that after the said judgment had been so recovered, and before the said note became due, and before any breach of the said promise, one James Kintrea, the deputy clerk of the said court in and for the county of Oxford, (the same being the court in which the said judgment was so entered,) did make and give to the plaintiffs, at their request, a certificate signed by him of such judgment, and which contained the like particulars as were and are required in certificates of judgment given by the clerk of the Crown and Pleas of Upper Canada ; and the plaintiffs did then thereupon, and before any breach of the said promise, and before the said notes became due, cause the same to be registered, and the same was then accordingly registered in the registry office for the county of Oxford, in which county the said James Watson then had and owned divers lands, tenements and hereditaments in possession, reversion, remainder and expectancy, and over which the said James Watson, at the time of the registering the said judgment as aforesaid, had a disposing power, which he might have exercised for his own benefit ; and thereupon the said lands, tenements and hereditaments became charged with the amount of the said judgment debt, by means whereof the defendant, before any breach of the said promise, became, and was, and is discharged from the performance thereof.

The plaintiffs took issue upon and demurred to both these pleas.

The grounds of demurrer sufficiently appear in the judgment.

Anderson, and *Crombie*, for the demurrer, cited *Smith Merc. L.* 275 ; *Story on P. N.* secs. 135, 403 ; *Burbridge v. Manners*, 3 *Camp.* 194 ; *Attenborough v. Mackenzie*, 25 *L. J. Ex.* 244 ; *Bell v. Buckley*, *Ib.* 163 ; *Morley v. Culverwell*, 7 *M. & W.* 174 ; *Ansell v. Baker*, 15 *Q. B.* 20 ; 12 & 13 *Vic.*, ch. 106, sec. 172.

Beard, contra, cited *King v. Gillett*, 7 *M. & W.* 56 ; *Price v. Moulton*, 10 *C. B.* 561 ; *Hargreaves v. Parsons* 1 *Cr. M. & R.* 741 ; *Murray v. Miller*, 1 *U. C. R.* 353 ; *Twopenny v. Young*, 3 *B. & C.* 210.

ROBINSON, C.J.—The defendant's counsel cited no authority that can be taken to support his first plea, and those cases which he did cite were so clearly inapplicable that we think we may safely conclude that he could find no decision which has gone the length of determining that the matter relied upon in the first plea is a bar to the plaintiffs' recovery.

The plea does not state any agreement by the plaintiffs to give time, nor was time given in fact, for the cognovit was without stay of judgment or execution, according to the statement of it in the plea.

The defendant might have been very much benefitted by such an effort to get the debt from the maker of the note, or at all events to secure it, but one cannot see how he could have been prejudiced.

The defence indeed is not intended to be rested on such a ground, but on the technical doctrine of merger of the simple contract debt in a higher security. That doctrine, however, applies only where the person who is sought to be charged on the simple contract is the same person who has given the higher security. The principle is, that obtaining judgment on a bill or note is an extinguishment of the original debt, as between the same persons who are the parties to the note and to the record.* But the judgment alone, without actual satisfaction, is no extinguishment as between the plaintiff

and other parties, whether prior or subsequent—Byles on Bills, 183; *Claxton v. Swift*, 2 Show, 494.

The confession in this case was taken from the maker, Watson, before the note had become due; but we do not see why that should make any difference, and we can find nothing to warrant our holding that it does.

Our judgment on this plea must, in my opinion, be for the plaintiffs.

Then as to the second plea. We are at a loss to know on what principle they could have been set up as a defence. It amounts to nothing more than that the maker of the note has his lands incumbered with a judgment, which when satisfied will necessarily put an end to all further claim upon the note against other parties, as well as himself; but until the judgment is satisfied the note is unpaid. The mere having a judgment against one of two joint and several makers of a note, whether it be registered or not, cannot disable the holder of the note from proceeding against the other maker; and this case, where the defendant is an endorser, cannot be stronger in favour of the discharge, to say the most of it.

We had lately a similar question before us in the case of *Kerr et al. v. Hereford et al.* (*a*).

BURNS, J.—The defendant set up by his first plea, that the note sued upon is extinguished by reason of the maker giving the plaintiffs a confession of judgment for the amount. No doubt, as respects the maker, all remedy by suit upon the note was merged in the judgment; but still the debt was not paid. The contract of the maker of the note was to pay at the day the note would become due, but the taking of the judgment accelerated the day of payment by means of the judgment, but did not extinguish the debt. It was the remedy which was extinguished. If the judgment had produced the fruit of payment, then the note would have been extinguished, and of course the defendant's contract would have been performed. The defendant's contract is different from that of the maker: he is to pay if the other

(a) Ante, page 158.

does not. The taking of a security from the maker, which has the effect of merging his contract in that of a higher nature, cannot destroy the contract of another who undertakes to perform if the maker does not. The fallacy of the argument that the defendant cannot be sued, consists in not bearing in mind the distinction between what operates as an extinguishment of the debt and an extinguishment of the remedy. In this instance the defendant was bound and the maker of the note was bound in two separate and distinct contracts in the same instrument. No one has ever as yet pretended to argue, that judgment obtained against the maker after the note becomes due was any bar to the holder suing the endorser, unless the judgment were satisfied. What difference does it make then in principle that a judgment is obtained before the day of payment arrives, when no further time be given? Instead of being dissatisfied, the defendant ought to be pleased that the plaintiffs did so much to relieve him if possible. Though the maker of the note, by the judgment, accelerated, so far as he was concerned, the day of paying the amount, yet how can it be said that prevented him from paying the debt on the day, and thus relieved the defendant from his contract? If the giving of the judgment had prevented the payment of the money on the day the note fell due, then the remedy against the defendant would have been extinguished no doubt, but I see no principle which it can be said establishes, that if the holder of a note obtains some security which enables him to obtain payment sooner if possible, it should have the same effect. The plea setting up that the plaintiffs registered their judgment, and thereby established a lien on all the property of the maker, was not attempted to be supported, and indeed could not be.

MCLEAN, J., concurred.

Judgment for plaintiffs on demurrer.

Judgment on the rule nisi for a new trial on the issues joined, confirming the judgment on demurrer.

The issues in this action, and in a second action between

the same parties, in which the pleadings were precisely the same, were tried at Woodstock, before *Robinson, C. J.*, and verdicts rendered in both cases for the plaintiffs, subject to the opinion of the court whether the evidence entitled them to a verdict on the pleadings, and whether the averment of the confession being taken at the plaintiffs request was an immaterial averment, and whether, if material, it did not mean that the confession was taken at the plaintiffs' request solely, and without defendant's request or concurrence.

Crombie and Anderson for the plaintiffs.

Beard for defendant.

The pleadings, and the authorities cited, are given in the report of the demurrer, ante page 208, which was argued at the same time.

ROBINSON, C. J.—Our judgment having been given for the plaintiffs on the demurrer in this case, they must recover, and there is no object in arguing upon the propriety of the verdict, except for the costs.

The pleas seemed to be proved, except in one very essential particular. They all in effect stated that the confession of judgment taken from Watson, the maker of the note, had been taken at the request of the plaintiffs, which I considered at the trial, and still think, must be understood to mean that the confession was taken to serve the purpose of the plaintiffs merely, and without the concurrence of this defendant, the endorser, still less at the endorser's urgent request. Then it was plain upon the evidence that the confession was not merely taken in the presence of the endorser, this defendant, and with his knowledge and concurrence, but that he strongly desired it, and went to the plaintiffs' agent, and entreated him for defendant's sake to do his utmost to procure Watson to give that confession to the plaintiffs, which the defendant in his plea complains of as an act that ought in law to discharge him. The defendant had in vain attempted by himself to get Watson to give a confession to the plaintiffs, and begged the plaintiffs' agent to use his

influence, which the agent consented to do, and was successful. It would indeed be most unreasonable that the defendant should be able to set up an act done at his own instance as barring the plaintiffs' remedy against him.

The assertion that cognovit was taken at the request of the plaintiffs is incorporated in the second plea, by reference to the first, and forms a part of the second plea as well as of the first ; and taking the plea in the sense in which I take it, without which it could not possibly be any defence, it was, in my opinion, distinctly disproved by the evidence. —Pitman on Principal and Surety, 176. The postea, therefore should go to the plaintiffs.

MCLEAN, J.—At the trial the question seemed to turn upon the allegation that the confession of judgment had been obtained from Watson *at the plaintiffs' request* ; that is, without the consent or concurrence of the defendant ; and it certainly was very clearly established that the defendant was the principal mover in procuring the confession of judgment to be given, and to be accepted by the plaintiffs. He urged the defendant to give it, was present without objection when it was given, and expressed his regret that it had not been given sooner, as he was afraid it was then too late. It is manifest that the defendant was influenced by a desire to serve his own interest in procuring the confession to be given, as it would cover the property of Watson and prevent it from being applied to the payment of the claims of other creditors. If indeed he then entertained the belief that the acceptance of the confession from Watson would have the effect of discharging himself from liability on the notes endorsed by him, not due at the time, he had a strong personal motive for urging such a proceeding ; but it seems difficult to imagine how he could suppose that a course which was decidedly for his benefit, and adopted at his request, could possibly relieve him from his liability as endorser of the notes.

If time had been given, or any prejudice could possibly arise to the defendant from Watson giving the confession

before the notes became due, the defendant might reasonably insist on being discharged as endorser. But the mere change or addition of securities, without expressly relinquishing the original debts, nor suspending for a time the creditor's right of action, will not, either at law or in equity, discharge a surety or party to a bill. As to one of the notes for \$3,800, bearing date the 17th May, and payable at three months after date, it is quite evident it must have been over due at the time the judgment was entered (27th of August), and the other two notes had but a short time to run, and would undoubtedly be dishonoured as the first had been. Under these circumstances, if the plaintiffs' attorney had requested a confession of judgment to be given which should cover the whole amount due and to become due from the maker, I cannot perceive that he would be doing any thing which the defendant as endorser could complain of. His situation could not be prejudiced by such a proceeding. His liability would remain the same, with a chance of its being lessened by prompt proceedings against the maker of the notes. The plaintiffs not being paid the amount of the notes at maturity would be entitled to give notice of non-payment to the endorsers, and to proceed against them, notwithstanding their judgment against the maker, precisely in the same manner as if such judgment had been obtained and acted upon after all the notes had become due. If an action had been brought upon each note against the maker after becoming due, the notes would still be good against the endorsers, if notice of non-payment were duly given ; and I cannot perceive any ground in law, or otherwise, why the plaintiffs should not have the same right to recover these notes against the endorsers which they would have had if the confession had been given after all the notes had become due. The defendant could not be sued before the notes became due, and unless a confession of judgment and a judgment entered thereon can amount to a payment, and must be so considered, the notes for which defendant has become security still remain unpaid, and the liability of the endorsers in full force. The defendant does not allege that

the notes have been paid, nor does he allege that the confession of judgment was taken as a satisfaction for the notes. He contends that these allegations were not necessary, and that the notes have become merged in the judgment. The confession of judgment was a *remedy at law* to enforce *payment* of the *particular notes* by the maker, not a *substitution* of any other security for the notes, so that the notes must be merged in such security. If the judgment were for any cause set aside the notes would still subsist, and might at any time be sued against the maker or endorsers, as they may still be against the endorsers, should the judgment against the maker remain unpaid. It appears to me that the issues were properly found for the plaintiffs on the trial, inasmuch as the confession of judgment was procured to be taken and was taken by the plaintiff at his request; and if it were otherwise, that the pleas do not set up any defence to the action. If the judgment against the maker cannot operate as a discharge of the endorser, the registration of that judgment, so as to charge the landed estate of Watson, cannot have that effect. If not registered defendant would have great reason to complain that by the plaintiffs' negligence Watson was at liberty to dispose of his property, and to pay other creditors, instead of being bound for the satisfaction of the debt to the plaintiffs. I cannot see how it is that defendant sets up as a defence, and as a reason why he should be discharged, proceedings which have been taken at his own request and clearly for his advantage.

BURNS, J.—I do not consider that the evidence sustained the plea, in the allegation that the confession of judgment was obtained at the plaintiffs' instigation and request. They did wish to have it, but the maker of the note refused to give it until pressed by the defendant to do so, and it was the defendant who finally obtained it. Even though the plea were proved, if the verdict had been for the defendant upon it, the plaintiffs would have been entitled to judgment *non obstante veredicto*; so the verdict being for the plaintiffs it is all right.

Judgment for plaintiffs.

ROBINSON V. SMITH.

Bond for a deed—Ejectment—Demand of possession.

Plaintiff sold a lot to defendant and gave a bond for a deed, receiving defendant's bond for the purchase money. Nothing was said about possession in either instrument. Defendant having made default in payment, after having been for some time in possession,

Held, that the plaintiff could maintain ejectment without either notice to quit or demand of possession.

Quare, as to the effect of the issue in ejectment now being only as to the right of possession.

EJECTMENT. The plaintiff sold the lot in question to defendant, and gave a bond for a deed. Defendant gave a bond to the plaintiff for the purchase money. There was no reference in defendant's bond to the purchase of the lot. Defendant went into possession. Default was made in payment of the bond for the money. The plaintiff brought ejectment without notice to quit or demand of possession, and a verdict was entered for defendant, at Toronto, before *Hagarty*, J., who held that the plaintiff, under the circumstances, could not recover. Leave was reserved to plaintiff to move to enter a verdict for him.

McBride obtained a rule *nisi* accordingly.

Cameron, Q. C., shewed cause, and contended that at all events a demand of possession was necessary to entitle the plaintiff to recover: that defendant, having entered as a purchaser, could not be ejected as a trespasser until he was placed in the position of one by holding over after being required to give up possession.

McBride supported the rule, and referred to *Phillpotts v. Crouch*, 5 U. C. R. 453, and *Stringham v. Ammerman*, 14 U. C. R. 550; *Doe Sherwood v. Stephens*, 6 O. S. 432; *Doe Stodders v. Trotter* 1 U. C. R. 310; *Doe Kemp v. Garner*, 1 U. C. R. 39, and *Doe Leeson v. Sayer*, 3 Camp. 8.

MCLEAN, J., delivered the judgment of the court.

The defendant is in possession, as appears by the evidence, without any written authority from the plaintiff. It was admitted that he had purchased from the plaintiff, and received a bond for a deed, but nothing was contained either in it or in the bond for the purchase money, as to the pos-

session of the lot until paid for. The defendant took possession and has since been allowed to hold it, but has made default in payment of the instalments. Ejectment could no doubt have been maintained against him the moment he entered, as he entered without any legal right to do so. His being allowed to continue so long in possession can make no difference in the strict legal rights of the parties. He was a tenant at sufferance only ; but if he had entered by virtue of a written authority, which recognised his right of possession until default in the payment of purchase money, the several cases to which reference has been made in our own court shew that ejectment might be maintained against him without any demand of possession or notice to quit. These cases must be taken till reversed to have established the law as to the possession between a seller and purchaser, where default is made in payment of purchase money.

There is another consideration which seems to me to be entitled to a good deal of weight, since the change in the form of the action of ejectment. Formerly it was necessary to shew that the party in possession was in fact holding as a trespasser, or as a mere intruder or occupant without right ; but according to the present proceeding the sole question seems to be who is entitled to the possession, without any reference to the manner in which he may have entered.

We think, under any circumstances, the plaintiff is entitled to have his rule made absolute to have a verdict entered for him.

Rule absolute.

HOPE V FERGUSON.

Registrar's fees.

Where a township lot has been originally granted by the Crown in halves, and the title to each has continued separate, the registrar must, on application, furnish an extract of conveyances relating to either half. He cannot furnish and charge for extracts of conveyances relating to the other part.

He is entitled to charge only 1s. 3d. for the first 100 words, and 9d. for each additional 100 words contained in the whole extract and certificate ; not 1s. 3d. for each memorial, treating it as a separate extract and certificate.

This was a case stated for the opinion of the court under the Common Law Procedure Act.

The defendant was the registrar for the county of Middlesex. The plaintiff, being interested in the title to the west half of the east half of lot 23 in the first concession north of the Egremont road, in the township of Adelaide, required from the defendant, as such registrar, a certificate of the state of the title of the west half of the east half of the lot.

The Crown had granted said lot 23 originally in half lots,—that is to say, the west half and the east half, to different persons—and so far they had continued distinct and separate, and by no conveyances had been intermingled with each other. The lots in the township were 200 acre lots, and the plan of the township made by the government did not shew a subdivision of the lots into halves. The custom had always been in the registry office to keep the index in this manner : namely, a page was taken for all the lots in a concession, then a space allotted for each lot in that concession, and the conveyances affecting each lot were there inserted by numbers, beginning with the first after the patent as No. 1, and these numbers then enabled the person searching to refer to the books containing the transcripts of the memorials. In the present case all the conveyances, whether of the west half or east half of the lot, were entered as of that lot, but the index in no way gave information whether the number one, for instance, or any other particular number, affected the east or west half of the lot.

In making the search and giving the certificate in this case, the defendant certified that his first search shewed that the Crown had granted this lot in halves, and then he made sixteen further searches of numbers of the index, which referred him to transcripts of memorials as well of the half of the lot not inquired for as of that sought after, and then the defendant charged for eighteen searches and certificates, instead of eighteen searches and one certificate, which was all that was done or certified.

The questions stated for the opinion of the court were :

First.—Has the registrar the right to insist upon furnishing extracts of all conveyances relating to a whole lot of 200 acres, when an abstract of the title to a portion of the lot is

required, or is the registrar limited in making his extracts to the conveyances relating to the part of the lot asked for, the lot being originally granted in half lots.

Secondly.—Has the registrar a right to charge 1s. 3d. for each abstract as stated, or is he only entitled to 1s. 3d. for the first 100 words, and the sum of 9d. for each additional 100 words.

BURNS, J., delivered the judgment of the court.

There appears to us no difficulty in either of the questions submitted to the court. As to the first, we do not think the registrar is bound in any way to give extracts or certificates of such portions of the lot as are not asked for, nor can he compel a person to pay for such. The registrar might make search to see whether the Crown had granted the whole of a lot or had granted it in halves, but as soon as he discovered that it was granted in halves his search and his extracts then should be confined to that part which was asked for; and his abstracts, for which he would have a right to charge, should be confined to that part. There is nothing in any of the registry acts requiring the registrar to keep an index in any particular form. The index is kept for the purpose of facilitating searches, and if the registrar finds that it enables him to make his searches more easily, to insert all the conveyances affecting a particular lot in one part of the page, he may do so, though the Crown may have granted it in half lots; yet that will not enable him to charge for searches and abstracts for the whole when not wanted. When a person subdivides a lot himself, and does not furnish the registrar with a plan, the registrar has no other mode than to put all conveyances in the one index affecting that lot. This case is not of that description, however, for the Crown originally granted it in half lots, thereby making them just as distinct as if the two had been separate lots. If the registrar, by his index, cannot tell without search which half of the lot the particular number of conveyance refers to in the index, but must look at the books, and there he finds that it is the other half of the lot than the one sought for, then it is his index which is at fault, and that search must go for nothing. If he had subdivided his index

as the Crown subdivided the lot, and followed the subdivision which the Crown had made, there would have been no such difficulty as presented in this case ; and we see no reason why the registrar should not, even for the purpose of convenience to himself in searching, adopt the division made by the Crown. The custom of the office, however, in making and keeping an index to render the searches more easy, will not sanction his making a charge like the present.

With regard to the second question, what was required of the defendant was that he should furnish a certificate of title of the west half of the east half of lot number twenty-three in the first concession north of the Egremont road, township of Adelaide, with judgments. The defendant, to complete this, has looked at a number of memorials, and he considers that each memorial is to be treated as a separate and distinct extract and certificate, though upon his own document furnished he has put but one certificate for the whole. According to his own shewing he had made but one extract and one certificate, though to do that he required to look at several memorials. He should have charged only 1s. 3d. for the first hundred words, counting each figure as a word, and then 9d. for each additional hundred words, contained in the extract and certificate counted together. It may be that in some instances extracts of memorials may be required to be certified separately, but this case is not of that description, for the registrar merely states the name of each grantor and grantee, and the date, the date, of registry, and what description of instrument, whether bargain and sale or mortgage. Judgment should be entered for the plaintiff.

Judgment for the plaintiff.

TAYLOR V. GRIER.

Promissory note—Notice of non-payment.

A note was presented for payment on the 9th of March, at G., where the indorser lived. and the notice was mailed on the following day at M., a village five miles distant, but was not received at G. until the 13th.
Held, sufficient.

ACTION upon a promissory note of William Grier, made on the 6th of May, 1857, payable to the order of defendant

Thompson in ten months, indorsed to defendant James Grier, and by him to the plaintiffs.

The maker and first indorser allowed judgment to go by default. The defendant James Grier pleaded, denying presentment to the maker and notice of non-payment, and also denying that the note was duly presented for payment at Griersville, as in the declaration alleged.

The note was made payable "at Griersville, and not elsewhere." The declaration averred that the note "was duly presented at Griersville, and was dishonoured, whereof the defendant had due notice."

At the trial at Toronto, before *Hagarty, J.*, it appeared that the note was presented at Griersville to William Grier the maker, on the 9th of March, the day on which it fell due, at eleven o'clock in the forenoon.

The maker and the defendant James Grier lived in Griersville, in which village there was a post-office. The person who presented the note having left behind him at Meaford, a village five miles from Griersville, the written notice which he was to have served on the indorser James Grier, returned to Meaford without giving or leaving for him a notice at Griersville; but the next day he posted the proper notice at Meaford, addressed to James Grier at Griersville. The post went only twice a-week from Meaford to Griersville, and the notice did not arrive at Griersville till the 13th of March.

It happened that James Grier was absent from home from the 9th till after the 13th; and it was sworn on the trial by his brother, who was the postmaster at Griersville, that he was not better able to pay on the 9th than on the 13th of March, his shop having been lately burnt.

It was objected at the trial that the notice was insufficient, the statute 14 and 15 Vic., ch. 94, requiring the notice in such cases to be mailed at the post-office nearest to the place of presentment; and a nonsuit was moved on that ground.

A verdict was rendered for the plaintiff for £164, leave being reserved to the defendant to move for a nonsuit.

Mr. *R. Vankoughnet* obtained a rule *nisi* accordingly. He cited *Wilson v. Pringle*, 14 U. C. R. 230; 14 & 15 Vic., ch. 94.

M. C. Cameron shewed cause, and cited *Bank of British North America v. Ross*, 1 U. C. R. 199; *Bank of Upper Canada*, 4 U. C. R. 483; *Bank of Upper Canada v. Smith*, 3 U. C. R. 358.

ROBINSON, C. J.—There is no doubt that, as the law stood before the statute 14 & 15 Vic., ch. 94, the notice that was given in this case would have been sufficient, being posted in Meaford and directed to the indorser at Griersville. The statute was passed to remove doubts that had been raised about the regularity of posting the notice on the day of maturity of the note; and the peculiar question that has been raised in this case affords an instance of what often happens: namely, that the attempt to settle one question by legislation may create grounds for new questions that could not have been raised before.

According to what the defendant contends must be the effect of the 2nd clause of 14 & 15 Vic. ch. 94, if the indorser had lived in a part of the province very remote from the place where the note was presented, the notice to him, if sent by post, must be taken or sent to the post-office in or nearest to the place where the note was presented, although to do this it might be necessary to send it a long distance in the very opposite direction to the indorser's residence.

The legislature could never have meant that. What they obviously must have intended to provide was, that the person who presented a note to the maker might, on the same day, or on the next, give notice to the indorser by letter, mailed in or nearest to the place where the presentment took place, however distant that might be from the residence of the indorser. And that was intended no doubt to be for the convenience of the person giving the notice; but there could be no imaginable reason for requiring that the notice must be mailed, if sent by post, in the post-office in or nearest to the place of residence of the maker, because that could answer no good purpose, as regards the convenience or safety of the indorser, as a general rule, but might in many cases be postponing considerably the time when he

could receive the notice. The statute might have been so expressed as to compel such a construction, though it could not have been meant, in which case we must have given way to it; but that such could not have been the intention is so plain; I think, that we ought not to adopt that construction, unless the language makes it inevitable.

That appears to me to be by no means the case. The statute only makes a notice sufficient which is so sent; it does not make it necessary that all notices to indorsers, when sent by mail, should be deposited in the post-office in or near the place in which the note was presented, but establishes it as one of the means of giving notice which shall be deemed sufficient.

BURNS, J.—I think the second section of the act 14 & 15 Vic., ch. 94, refers to cases where the bill or note has been protested for non-payment, and that *such* notices shall be deemed and taken to have been served to all intents and purposes upon the party to whom the same shall be addressed, being deposited in the post-office nearest to the place of making presentment of *such* bill or note. As the law stood previous to the passing of this act, if the holder and endorsers of a bill or note which was protested lived in different towns or places, and there was a general post-office there, the post office might be used as the means of transmission of the notices; so also where parties living in the same town, if there was a penny post or local post; but if there were no communication of that kind, then it was incumbent on the notary, or the holder of the bill or note, to cause notice to be conveyed to or reach the person intended to be charged by special messenger or otherwise. I have always taken the statute to put it upon the footing, that in no case of notice of protest for non-payment need there be any other service of notification than depositing the notice, properly addressed, in the post-office nearest the place of presentment. One can easily imagine cases where such a mode of giving the notice might be longer in reaching the party to be charged than would be the case under the old rule; as, for instance, a note might be made payable at Meaford, the place spoken of, requiring presentment to be made there in

order to charge an indorser living in Toronto ; but yet the holder, who might live in Toronto also, would be quite right in depositing the notice of protest in the post office at Meaford, directed to the endorser in Toronto, though the endorser might by the course of post be several days longer receiving it than if the holder here in Toronto sent a notice to his place of residence or place of business. In the present case, however, the note was not protested, but only presented for payment, and notice given by the person who acted as agent for the plaintiff. The simple question is, whether there be any rule of law binding upon the plaintiff to have caused the notice to be deposited in the post-office at Griersville, rather than that the person should go back to his place of business or residence, and then post the notice from that place within the time the law allows as reasonable diligence. The agent was not bound to wait all of the day at Griersville on which he presented the note to the maker, nor was he bound to give notice to the indorser on that day. It sufficed for him to do that on the following day ; but the following day he was at Meaford, and therefore, as he could not deposit the notice in the post-office at Griersville without going back there to do it, he did what the law has always held to be sufficient in cases where the parties live in different towns—namely, he deposited the notice on that day in the post office at Meaford, directed to the defendants address at Griersville; and I think that was sufficient.

McLEAN, J., concurred.

Rule discharged.

MCKENZIE ET AL. V. VANSICKLES ET AL.—THE TIMES AND
BEACON INSURANCE COMPANY—GARNISHEES.

Insurance—Unjust defence—Defective plea—Amendment refused.

In an action on a policy of insurance, defendants pleaded a communication opened between the building where the goods insured were and the building adjoining, without notice to them, contrary to one of the conditions of the policy. At the trial it appeared that they had mis-described the alteration on which they intended to rely, but it was also shewn that such alteration had not in any way caused or contributed to the fire.

Held, that under these circumstances an amendment of the plea was properly refused.

ACTION by the judgment creditors, under the Common Law Procedure Act, against the Times and Beacon Insurance

Company, on a policy of insurance effected with them by the judgment debtors on certain goods.

At the trial at Stratford, before *Robinson, C. J.*, a verdict was found for the plaintiffs for £664 12s. 6d.

Draper moved for a new trial on affidavits, and on account of refusal by the learned Chief Justice of an amendment moved at the trial.

The facts of the case are fully stated in the judgments.

ROBINSON, C. J.—On consideration since the trial, I think I did what was right in refusing the amendment, and at any rate the refusal would not alone be a ground for new trial, though if it should be thought that it would have been proper to have allowed the amendment, the refusal would strengthen the application for a new trial on other grounds.

The garnishees assert that they had good grounds for suspecting that the execution debtors (the insured) had set fire intentionally to the premises insured; but not being able to prove it, they did not plead it as a defence; and that having those suspicions, they felt themselves the more justified in setting up the other defence on which they relied, though under other circumstances, it might be thought rigorous in them to do so. That defence, last alluded to, was, that after the insurance the insured had, without the assent or knowledge of the insurers, opened a direct communication between an adjoining building and that insured, and thereby forfeited all benefit of their policy. This communication, it was proved, had nothing to do with occasioning the fire, which did not come from that building, but extended to it.

The fire came from a new building put up by the insured, behind the house insured: that new building had a direct communication with the other; but before the insured put up that building in which the fire did originate they obtained the consent of the insurers, who did not even exact any additional premium.

The insurers, perhaps under the impression that the fire arose from the other building, between which and that

insured a door had been opened without previous reference to the insurers, put in a plea meant to describe the alteration made by opening this communication, but mis-conceiving the nature of the alteration, they gave an inaccurate description of it, and the plaintiffs having denied the truth of the plea, it was clear from the evidence that the defendants' plea was not proved. The defendants then applied to be allowed to amend, but I thought it would not be in advancement of justice, for it is not usual to allow amendments in order to facilitate either hard actions or hard defences. Since the defendants had not thought proper to set up as a defence that the building had been wilfully set fire to, I thought I ought to look at the plaintiffs' claim as a fair and honest one, as regarded that point; and if it was, then, although the defendants, if they had set up the alleged alterations as making void the policy, might have succeeded in defending the action, though that had nothing to do with causing the fire, yet having failed to avail themselves of such a defence, I thought it fair to leave them to abide by the consequence, without helping such defence by an amendment after the evidence had been received.

BURNS, J.—The action is to try whether the garnishees be liable upon a policy of insurance effected by the judgment debtors with the garnishees, dated 12th of March, 1857. The fire happened on the 10th of March, 1858.

The garnishees pleaded three pleas.—1st. That after the policy was effected the judgment debtors permitted an alteration to be made in the building containing the goods insured, by erecting a staircase from the adjoining building to that containing the goods, and that notice of this was not given. 2nd. That the judgment debtors had not goods to the amount insured. 3rd. That there was fraud in describing the nature and value of the goods.

It appeared in evidence that what the defendants pleaded as an alteration of the building was not so, for it existed before the insurance was taken, and was built with the house originally. The postmaster, who had the ground-floor of the building adjoining the shop of Vansickles & Co., occupied it

as the post-office, and he lived in the apartments above the shop of Vansickles & Co. He came to live in those apartments in September, 1857, and for his convenience, to pass and repass from that staircase to the post-office, the owner of the building, who was a different person from the insurers, permitted him to cut a hole through the partition wall, between the two buildings upon the ground-floor. This it appears had nothing whatever to do with either originating the fire or promoting it after it began. The fire commenced in the building in which the insured goods were, and then communicated from that to the post-office building, and the whole was destroyed. The defendants' counsel applied for leave to amend the plea, and instead of stating an alteration by the building of the staircase, he wished to state that the alteration of the premises was the making of the hole spoken of, allowing the one building to communicate with the other. The learned Chief Justice declined to allow this amendment, on the ground that it did appear the alteration, even if it were such a material one as could affect the insurance, yet was neither the proximate or approximate cause of the loss, or could in any way have contributed to it.

Mr. *Draper* has moved upon affidavit, stating that the defendants were taken by surprise in the evidence respecting the alteration, and also on the ground that the learned Chief Justice refused to allow the amendment. When an amendment has been made the court will review the case, and adjudge whether it be legally done ; but where it is discretionary either to grant or refuse it at *nisi prius*, it is not open to either party to come to the court and complain of it, as a legal ground for disturbing the verdict. Then, looking at the case as one where the defendants can be said to be taken by surprise by the evidence offered at the trial, there is not ground to support it. Most likely the defendants' counsel was surprised by the evidence, but the question is whether there was any ground for the defendants being in a similar position. I think not. It appears that an inspector of the company was engaged with the insured in adjusting the amount of the loss ; and surely we must suppose he made himself acquainted with the facts, or if he did not, he

did not discharge his duty properly ; and if he was misled by incorrect information from the insured, that fact should be shewn. There is nothing to shew that the defendants have been in any way misled by the insurers with regard to the alterations spoken of.

Suppose, however, the alteration of making the hole spoken of were pleaded, the next question which would arise would be whether it was a material one, and looking at the facts proved in this case, it would amount to a bare chance of affording the defendants an opportunity of escaping from the policy, which I do not think would be advancing the ends of justice to grant after verdict in a case like this.

MCLEAN, J., concurred.

Rule refused.

HODSON V. THE MUNICIPALITY OF THE TOWNSHIP OF WHITBY.

Action on award—Plea, no award—Effect of—Reference by resolution of Municipality.

A municipality by by-law opened a road across the plaintiff's property, and arbitrators were appointed under the 16 Vic., ch. 181, one by the council, one by the plaintiff, and a third by the judge of the county court, to determine what compensation should be paid to him. Afterwards a resolution was passed by the council, that the arbitrators so chosen should be instructed to take into consideration the damages to the plaintiff's crops and fences, so that all differences might be settled ; and they awarded separate sums for opening the road, and for damages respectively.

The plaintiff having brought debt on his award, defendants pleaded no award.

Held, that under his plea they could not dispute the arbitrator's authority to award the latter sum ; but should have moved to set aside the award or might have pleaded *nunquam indebitati* to that sum, which would have brought the submission in issue.

Quære, whether the resolution was binding upon the council as a reference.

The plaintiff sued in debt for £269 12s. as due to him upon an award made by two arbitrators, Pawson and Sexton, concerning certain matters in difference, and whereby it was awarded that defendants should pay to the plaintiff the said sum.

Plea.—That the two arbitrators named did not make the supposed award of and concerning the matters in difference referred as aforesaid.

At the trial at Whitby, before *Draper*, C. J., the appoint-

ment of arbitrators, and their authority to appoint, was admitted by defendants' counsel.

The parties had each appointed an arbitrator, and a third was appointed by the judge of the county court.

A by-law of the township of Whitby was passed in August, 1857, laying out a new road across lots 15, 16, 17, 18, 19, and 20, in the 8th concession of the township of Whitby.

On the 29th of October, 1857 the Municipal Council of Whitby appointed J. Ham Perry their arbitrator, to determine what damage should be paid to this plaintiff for carrying the road through lots 19 and 20.

On the 16th of November, 1857, a resolution was carried in the council, that the arbitrators chosen between the corporation and the plaintiff, respecting the opening of a road across the plaintiff's land, be instructed to take into consideration any damages to the crops and fences belonging to the plaintiff, on account of the opening of said road, with the view that all differences between the municipality and the plaintiff may be settled and determined by said arbitration.

Perry was appointed arbitrator by the municipality, Pawson by the plaintiff, and Sexton by the judge of the county court; and on the 14th of December, 1857, the arbitrators, Pawson and Sexton, made an award, in which they recited that the municipality and the plaintiff had not been able to agree upon the compensation which the plaintiff was entitled to for the opening the road through his land, and that the three arbitrators had been appointed to determine upon the damages to which the plaintiff was entitled under and by virtue of the statute 16 Vic., ch. 181; and recited also that certain other differences having arisen between the municipality and the plaintiff, as to compensation to which the plaintiff claimed to be entitled for damages by him sustained, and expenses to which he had been put in consequence of the municipality having, previous to the passing of the said by-law, directed and authorised the opening of a road over said lots 19 and 20, the property of the plaintiff; and that the municipality and the plaintiff being unable to agree upon the amount of such compensation, *it was agreed*

between them to refer the said matter to the award of the same three arbitrators, with a view to settle all differences between the said municipality and the said plaintiff.

The award then stated *that the said J. H. Perry, William Pawson, and William J. Sexton*, having heard the parties and considered their allegations and proofs, did thereby make and publish *their* award in manner following:

As to the compensation for opening the road *under the said by-law*, they awarded that the municipality should pay the plaintiff £129 16s.

And as to the compensation the plaintiff was entitled to for damages by him sustained, and expenses to which he had been put, in consequence of the municipality having, previous to the passing of the said by-law, directed and authorised the opening of a road as aforesaid, they awarded that the municipality should pay to the plaintiff £111 6s.

The award also directed that the municipality should pay Hodgson's costs of and incidental to the reference and award, £9 10s., and £19, being the arbitrators' charges for the reference and award, and should also bear their own costs of the same, the several sums to be paid on or before the 31st of December following.

The award, though expressed to be made by all the arbitrators, was in fact executed only by Pawson and Sexton.

It was objected by the defendants that the award executed by the two was invalid, as it purported to be the award of the three; also, that except as to the compensation for opening the road through the plaintiff's land *under the by-law*, the arbitrators had no authority.

A verdict was taken for the plaintiff for £269 12s., and leave reserved to move to reduce it to £129 16s.

M. C. Cameron obtained a rule *nisi* accordingly, to which *Adam Crooks* shewed cause.

McMichael supported the rule.

The authorities referred to are cited in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The only question is, whether the award is valid, so far as regards the £111 6s.; or, rather, whether the plaintiff was

disabled from recovering for that sum, on the ground that the arbitrators had no authority to award upon that part of the plaintiff's claim.

The only issue raised by the pleadings is, whether the two arbitrators did execute such an award as that declared upon. It was proved that they did ; but the defendants object that they had no right to award upon part of the claim which the plaintiff brought forward, and on which they did award. That does not come well from the defendants, because they did very expressly, by their resolutions, refer all differences, though they were not bound to do so under the act 16 Vic., ch. 181, sec. 33 ; and as regarded any claim but that coming strictly under the statute, a question might be raised as to the binding force of a submission made by the reeve merely, or by resolution of the council.

Here, however, the defendants being sued upon the award do nothing but traverse the making of the award set out, and they claim a right under that plea to object that the award which was in fact made was invalid, because they had not submitted to the arbitrators any such claim. Now, whether they could not in law submit it, or whether they did not do so, it appears very clear upon the award itself that such claim—that is, for damages by reason of the interference with the plaintiff's property before their by-law was passed—was in fact entertained and awarded upon ; and that being so, the defendants could either have moved against the award on that ground, or could have pleaded to that part of it which they contended was illegal. As I conceive, (though a doubt has been intimated on that point,) they could, in an action of debt on the award, which this is, have pleaded *nunquam indebitati* as to so much of the sum awarded, and that plea would have brought the submission in issue.

We do not think that under the plea of no award in this case the defendants are at liberty to deny the submission, to say nothing of the admission made by them at the trial as to the due appointment and the authority of the arbitrators. The cases cited of *Fisher v. Pimbley* (11 East 188) ; *Dresser v. Stansfield* (14 M. & W. 823), and

of *Adcock v. Wood* (6 Ex. 814), do not apply, we think, in support of the defendant's rule. They shew that the plea of *no award* would not put in issue the validity of the award; on the face of it, that being matter of law, and that the defendants should demur when sufficient appears in the declaration to shew the objection, or if not should set out the award and demur.

But we assume that the parties in this case might legally have *agreed* to refer both heads of claim, if they pleased, and in that case nothing illegal appears on the face of the award but the objection is, that as to one of the sums awarded against the defendants they are not bound to abide by the award, because they gave no authority to arbitrate on that claim. That was a defence, we think, which required to be set up in a special plea, if the defendants could not have pleaded *nunquam indebitati*, which however we think they could have done, and by that means have put the plaintiff to proof of the submission.

Rule discharged.

BENEDICT ET AL. V. VANALLEN ET AL.

Limited partnership—Description of the business—Payment by special partner
—12 Vic., ch. 75.

A. and B. formed a limited partnership, A. to be the general partner, and B. the special, contributing £750. B. held A.'s notes for that sum, which he gave up to A. by way of payment. *Held*, not a payment in money within the statute.

Held, also, that a description of the business to be carried on as that of "general dealers," was insufficient.

Quære, whether under a plea of *non fecit* to a note signed by the firm, defendant was entitled to shew a limited partnership; but where he was allowed to do so.

Held, that the plaintiff might, in answer, object to the description of the business; and, *semble*, that he might also object that the special partner had not paid in his share.

ACTION on a promissory note, dated 3rd of June, 1857, payable six months after date, for \$801.18, signed "D. R. VanAllen & Co."

The defendant Van Allen pleaded a plea which was given up. The defendant Williams pleaded that he did not make the note.

At the trial at Chatham, before *Burns, J.*, it was proved

that the signature "VanAllen & Co." was that of VanAllen, and that Williams was his partner in the business. On the defence it was proved that the two defendants, on the 10th of October, 1856, entered into a limited partnership, and the deed signed by them was in these words :—

"We, the undersigned, do hereby certify that we have entered into co-partnership, under the style or firm of D. R. VanAllen & Co., as *general dealers*, which firm consists of Daniel R. VanAllen, residing usually at Chatham, as general partner, and John Williams, residing usually in the township of Howard, as special partner ; the said John Williams having contributed £750 to the capital stock of the said partnership ; which said co-partnership commences on the 10th of October, 1856, and terminates on the 1st of September, 1859."

It appeared that previous to the 29th of May, 1856, the two defendants had been in partnership, and dissolved : that VanAllen gave Williams two promissory notes, each for £375, and dated the 29th of May, 1856, one payable in three months and the other in six months. In October, 1856, when the limited partnership was formed, Williams surrendered these two notes to VanAllen, and that formed Williams' capital in the new concern, and no money whatever was paid.

The learned judge was inclined to think, that under the plea of *non fecit* the defendant Williams could not set up that he was only a special partner ; but he received the evidence. He ruled, however, that the deed describing the business to be carried on as that of *general dealers*, was no compliance with the law ; and, next, that the capital of the special partner to be paid in should be in cash or money, and that the merely giving up one note over-due and one not due was no payment of capital into the business.

The plaintiffs had a verdict, with leave to the defendant to move to enter a verdict for him, if the court should think him entitled.

Becher, Q. C., obtained a rule to shew cause why a verdict should not be entered for the defendant Williams,

pursuant to the leave reserved, or why a new trial should not be granted, with leave to the defendant Williams to add a plea setting up the limited partnership.

Christopher Robinson shewed cause, citing *Bowes v. Holland*, 14 U. C. R. 316; *Whittemore v. Macdonell et al.*, 6 C. P. 553; *Hollowell v. McDonell*, 8 C. P. 21; *Davis v. Bowes*, 15 U. C. R. 280; *Watts v. Taft et al.*, 16 U. C. R. 256.

ROBINSON, C. J., delivered the judgment of the court.

The case of *Watts v. Taft et al.*, in this court (16 U. C. R. 256), is material to be considered in connexion with this case.

The note sued upon here was signed by VanAllen, in the name of VanAllen & Co., not of VanAllen alone, and evidence was given that the defendant Williams was a partner with VanAllen in his business. That therefore made Williams *prima facie* liable as one of the firm, of which the signature gave notice.

Then the defendant was allowed to give in evidence, under the plea of *non fecit*, the articles of association under which he claimed to be liable only as a special partner, and so not bound for the purpose of this action by the signature to the note.

We think the plaintiffs could meet that by objecting that the articles of partnership did not specify any business which the parties were to carry on; that is, a general business of some particular kind, such as merchants, brokers, millers, &c., not merely the business of *general dealers*, which we do not take to be within the act; and we think, also, (though that might require to be more maturely considered, as it was matter not apparent on the face of the deed of association,) that the plaintiffs might give in evidence the fact that there was no special partnership under the act, for the reason that no capital was in fact contributed by Williams, since there was nothing on the defendants' part appearing in the pleadings to shew that he relied on being a special partner only, and the plaintiffs, therefore, were not called upon to repel by pleading any allegation of a limited partnership, for there was no such allegation on the record as having been made by the defendants.

It would be idle to grant a new trial, with power to the defendant to plead that he was only a special partner, when it is so perfectly clear that the facts proved shew him to have been a general partner, according to the express provisions of the act, independent of the fact that the deed of association specifies no business to be carried on that we can take to be within the statute.

Rule discharged.

THE COMMERCIAL BANK OF CANADA V. JOHN CAMERON,
JOHN HILLYARD CAMERON, JOHN A. McDONALD, AND
JOHN WILSON.

*Discontinuance by mistake against two of several joint debtors—Amendment—
Discontinuance allowed against the others allowed after verdict.*

The plaintiffs having taken a joint and several bond from defendants for a debt of £5,000, declared against them all as upon a joint bond only; one of the defendants pleaded a special plea, and the other demurred, and the plaintiff's attorney, being under the impression that the bond had been declared upon as joint and several, discontinued as against these defendants, and took a verdict against the others, who moved to arrest the judgment.

The sum being large, on motion made in the following term, the court allowed the plaintiffs to discontinue against the last mentioned defendants, on payment of all costs, so that the claim might not be defeated.

The plaintiffs sued on a bond, declaring on it as a joint bond of the four defendants, in £10,000 penalty, with a condition that the defendant John Cameron should pay to the plaintiffs £5,000, or so much thereof as might be advanced to him on his cash credit with the plaintiffs half-yearly, on the 25th of November and 25th of May in each year, so long as the plaintiffs should continue the credit; with interest to be paid as mentioned in the bond, and also 5s. on every £100 advanced on his check under the credit so given to him. The plaintiffs averred that they made advances, &c., so that on the 25th of May, 1858, there was due from defendant J. Cameron to the plaintiffs, on account of advances and interest and the said commission of 5s. per cent., a large sum—namely, £5,000—and that, though the plaintiffs had demanded payment, the same remained unpaid.

The defendant John Cameron pleaded usury.

The defendant J. H. Cameron pleaded that the plaintiffs

did not advance to J. Cameron on the cash credit the sum of £5,000, in manner and form, &c.

The defendant McDonald pleaded *non est factum*.

Defendant Wilson demurred to the declaration, assigning various causes.

The plaintiffs took issue on the pleas of defendants J. Cameron, J. H. Cameron, and McDonald, and joined in the demurrer of defendant Wilson.

A discontinuance was entered, by leave of the court, as against defendant John Cameron and defendant Wilson, and a venire awarded to try the issues upon the pleas of the other two defendants.

At the assizes, held at Kingston, before *McLean*, J., on the 10th of November, 1858, a verdict was taken for the plaintiffs against defendant J. H. Cameron and defendant McDonald, for £5,271 6s. 8d. damages, assessed on the breach of the condition.

In this Term the defendants J. H. Cameron and McDonald obtained a rule to shew cause why the judgment should not be arrested on the verdict against them, the action being on a joint bond, upon which the plaintiffs could not recover against two only of the four obligors.

Phillpotts, for the plaintiffs, obtained a cross rule on the defendants, to shew cause why the plaintiffs should not have leave to withdraw or set aside all the proceedings that had been taken since the appearance entered for defendants, and to declare *de novo*, according to the legal effect of the bond given to the plaintiffs; or why the plaintiffs should not have leave to withdraw the discontinuance entered as to defendants J. Cameron and Wilson, and to set aside the verdict taken against the other two defendants; or why a rule should not go for discontinuance as to defendants J. H. Cameron and McDonald, and for setting aside the verdict; or why the plaintiffs should not have leave to amend the declaration, by setting out the bond as joint and several, and according to its legal effect.

In support of the plaintiffs' application an affidavit was filed of their attorney, to which was annexed the bond sued on, which was a joint and several bond, dated 10th of March

1857; and it was sworn by the plaintiffs' attorney that by some mistake or misapprehension the bond was declared upon as if it was a *joint bond* only: that he took out the rule for discontinuance, and entered the discontinuance, on the supposition that the bond had been properly declared on as a joint and several bond; and that he feared the plaintiffs would be thrown over the assizes, and greatly delayed in obtaining judgment, if they were obliged to wait till the plea of defendant J. Cameron and the demurrer of defendant Wilson had been disposed of: that he was instructed that the discontinuance, as the pleadings stood, might have the effect of releasing the two defendants against whom the verdict had been obtained: that a rule *nisi* had been obtained by the plaintiffs to arrest the judgment on that ground, and that he was instructed that it was necessary for the interests of the plaintiffs either to have leave to amend their declaration by declaring on the bond as joint and several, or to discontinue to enter a *nolle prosequi* as against defendants J. H. Cameron and McDonald.

Cameron, Q. C., one of the defendants in person, supported the rule to arrest the judgment, and shewed cause against the plaintiffs' rule to amend. *James Patterson* shewed cause for defendant John Cameron. *C. Robinson* for defendant Wilson.

Adam Wilson, Q. C., and *Phillpotts* contra, cited *Bowden v. Horne*, 7 Bing. 716; *Cannan v. Reynolds*, 5 E. & B. 301; *Price v. Parker*, 1 Salk. 178; *Goodenough v. Bettes*, 2 Cr. M. & R. 240; *Beeton v. Jupp*, 15 M. & W. 149; *Benton v. Polkinghorne*, 16 M. & W. 8; *Young v. Hichens*, 6 Q. B. 606; *Dale v. Eyre*, 1 Wils. 306; 1 Saund. 206, note; *Wilkinson v. Sharland*, 11 Ex. 33.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiffs' attorney was wanting in care in this case; first, in not setting out the bond as it really was; though there was nothing wrong in declaring against the defendants as being jointly bound, and saying nothing about their being severally bound also, if the plaintiffs had only been consistent in their proceedings, and had not proceeded upon it afterwards, as if it were joint and several.

Then it was unfortunate that when the plaintiffs did determine, for the sake of avoiding delay, to abandon the action as against two defendants, one of whom had pleaded a special defence, and the other had demurred, that the declaration was not looked at to see that the bond had been certainly so declared upon as would admit of such a proceeding without compromising the remedy against the others. If the amount were not so large at it is, we should probably have refused to the plaintiff the extraordinary indulgence that is asked, the consequence of which would be that they would be left to pursue, if they pleased, a remedy against the attorney. But in a case of this description, where in a plain right of action upon a bond the proceedings have by inadvertence been such that a palpable mistake in practice or pleading, if the court cannot interfere, might have the effect of throwing upon the plaintiffs the loss of the whole debt, or perhaps ruin their attorney, we have only to ask ourselves whether we *can* rectify the error.

The courts have been usually unwilling to grant amendments which would prejudice the position of bail or sureties, and that principle would still, no doubt, be allowed to have weight, though perhaps not to the same extent as formerly, since the almost unlimited power of amendment given by the Common Law Procedure Act.

After a general verdict such as this is, no doubt the rule is that there can be no discontinuance as of right by a sidebar rule, nor any right or reason to expect that the court, upon a special application, will grant leave to discontinue, unless indeed the circumstances are very strong and peculiar. But we think we are supported in allowing the plaintiffs to discontinue here by what is said by *Baron Parke*, in *Benton v. Pilkington* (16 M. & W. 10), that "after judgment on a general verdict a rule to discontinue generally is irregular, unless granted on a special application for that purpose, and on payment of costs;" and by the cases of *Wilkinson v. Sharland* (11 Ex. 34), and *Young v. Hichens* (6 Q. B. 606), all of which were referred to in the argument.

There is no ground for saying here that the application is an attempt on the plaintiffs' part to obtain a new trial by an

indirect course, because he is dissatisfied with the verdict. It is a case altogether of another kind. The plaintiffs have a verdict for all they demand, but they find that from an unfortunate step it can be of no use to them, and that unless they can be assisted they will lose their remedy against all, for a bond debt of £5,000.

We think we should allow the plaintiffs, though at this late stage, to discontinue as against the defendants J. H. Cameron and McDonald, on payment of their costs incurred since the discontinuance entered against the other two defendants, and their costs of opposing this application, and costs of the other two defendants of opposing this rule of the plaintiffs; and then the plaintiffs will be left at liberty to proceed as they think proper against all or any of the obligors; and the defendants rule to arrest the judgment will be discharged.

Rules accordingly.

LYNCH V. JOHN SHAW, ARCHIBALD SINCLAIR, WILLIAM GEORGE HINDS, NELSON GARRETT, JOHN SHAW, JOHN WATSON, AND JOHN HAM PERRY.

Action for goods supplied to vessel—Proof of ownership.

In an action against several defendants for wood furnished to a steamer, the proof of ownership consisted of parol evidence that one defendant had taken stock in the vessel, and paid for it, and had represented several stockholders at a meeting held after she had been lost. A certificate was also produced, signed by the collector of customs, stating the names of the registered owners, and the number of their shares.

Held, insufficient.

Quære, whether the certificate was admissible in evidence under the 16 Vic., ch. 19.

ACTION on the common counts, for goods sold and delivered, and on account stated.

The defendants Hinds and Shaw pleaded, never indebted; the other defendants allowed judgment to go by default.

At the trial, at Cornwall, before *Richards, J.*, it appeared that the plaintiff's claim was for wood furnished to the steamer "Monarch," in the autumn of 1856, and he produced receipts from the purser of the boat for the wood delivered.

It was proved by a witness examined at the trial, that the

defendant Shaw (of Kingston) was a stockholder in the "Monarch" when she was lost: that he took stock in her to the amount of £150, and paid it; and that it was believed that he had not parted with his stock, because he had represented the Kingston stockholders at a meeting held in Toronto after the boat was lost, which was in the winter of 1857 or 1858.

The plaintiff produced also the following document, obtained from the custom-house in Montreal:

"Custom-house, Montreal, 23rd October, 1858."

"The undermentioned parties are at this date the registered owners of the number of shares set opposite their names in the steamer "Monarch," registered at this office under No. 13 of 1856, on the 5th of September, 1856.

Archibald Sinclair	16 shares.
D. & J. McCarthy & Co	5
Ralph Fish	2
John Shaw	24
William George Hinds	17

Shares 64

“(Signed) J. BOUTHILLIER,
Collector.”

It was objected that this certificate formed no legal proof of the registry, and leave was reserved to move to enter a nonsuit upon that objection. The jury found for the plaintiffs £57 16s.

Draper, for defendant Hinds, and *Phillpotts*, for defendant Shaw, each obtained a rule *nisi* for a nonsuit, pursuant to leave reserved, or for a new trial on the law and evidence.

J. S. McDonald, Q. C., shewed cause, citing *Braithwaite v. Skofield*, 9 B. & C. 401; *Ellis v. Schmœck*, 5 Bing. 521; 8 Vic., ch. 5, sec. 22; 16 Vic., ch. 19, sec. 9.

ROBINSON, C. J.—Presumption of ownership, arising from possession and management of the ship, would, I think, be sufficient evidence *prima facie* to make the defendants liable, but there was no such evidence in this case.

So also, if it had been shewn that the defendants, whose

liability is in question, ordered the supplies, there would be no question of their liability ; that is, if the plaintiff had reason to infer that he was furnishing the wood upon their credit ; but of that there is no evidence.

In order to recover against Shaw and Hinds the plaintiff was reduced to the necessity of proving their ownership of the steamer, in order to shew them liable upon that ground. For this purpose parol evidence that they had taken stock was, in my opinion, not sufficient. Neither was it sufficient to shew, as regarded defendant Shaw, that he had attended some meeting in Toronto, on the affairs of the steamer, as representing the Kingston stockholders, because without legal proof of the fact of ownership there could be no conclusion safely drawn from that fact, since he might have been there as an agent for those interested, having no interest himself.

We are confined therefore to the evidence afforded by the collector's certificate, and the question is whether that was sufficient. I incline to think that the document produced was admissible under our statute 16 Vic., ch. 19, sec. 9, as a certified *extract* within the fair meaning of that clause ; there being, as I assume, no reason to doubt the identity of the steamer "Monarch" mentioned in it, with the steamer "Monarch" in question ; but the difficulty is, that the production of the register of ownership of a vessel is not evidence on which a stranger can found his right of action for supplies against a party as owner.

The case of *Fraser v. Hopkins* (2 Taunt. 5), *Flower v. Young* (3 Camp. 240), *Smith v. Fuge* (Ib. 456), seem to establish this, although it had been formerly held to be good *prima facie* evidence, liable to be disproved. The registry is now held to be negative evidence only, in regard to ownership ; that is, no person can establish his position as owner without shewing himself to be a registered owner, but it is held to be in itself no *affirmative* evidence for the purpose of proving a party liable as owner. Chief Justice *Abbott*, in his treatise on Shipping, 9th Ed., pages 72, 74, recognises this as a principle of evidence, and so does Mr. *Starkie*, in his work on Evidence, vol. i., page 249. Admit-

ting that the imperial act 17 & 18 Vic., ch. 105, sec. 107, is in force here, yet I do not think that was intended to alter or can have the effect of altering the law of evidence in this particular, but must be looked upon as the same in substance as the 22nd section of our statute 8 Vic., ch. 5.

MCLEAN, J.—The evidence certainly appears to be wholly insufficient to entitle the plaintiff to recover against either of these defendants. The mere certificate of the collector of customs of the names of persons who appear to be the registered owners, if receivable in evidence, might expose parties to actions who perhaps never were owners, or who, if they were owners, might long since have parted with their shares. The registration of a vessel may be made by the declaration of one or more owners of the names of the several proprietors and the numbers of shares held by them respectively; and though it may be presumed that such declaration will generally be correct, yet if a liability for repairs or necessities furnished to a vessel would arise against a party included in such declaration merely from his name appearing in it as one of the owners, great injustice might take place, and persons might thus be rendered chargeable by the act of another in matters with which they had no connexion whatever.

Under the 17 & 18 Vic., ch. 104, sec. 19, every British ship must be registered in a manner therein mentioned, except,—1st. Ships duly registered before that act comes into operation. 2ndly. Ships not exceeding fifteen tons burden, employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of *some British possession*, within which the managing owners of such ships are resident. 3rdly. Ships not exceeding thirty tons burden, and not having a whole or fixed deck, and employed solely in fishing or trading coastwise on the shores of Newfoundland, or parts adjacent thereto, or in the Gulf of St. Lawrence, or on such portion of the coasts of Canada, Nova Scotia, or New Brunswick, as lie bordering on such gulf. The mode of registration is pointed out by the act, and by the 107th section it is provided that every

such register or copy of a register, and also every certificate of registry of any British ship, purporting to be signed by the registrar or other proper officer, shall be received in evidence in any court of justice, or before any person having by law or by consent of parties authority to receive evidence *as prima facie proof of all the matters contained or recited in such register*, when the register or such copy is produced, and of *all the matters contained in or endorsed on such certificate of registry*, and purporting to be authenticated by the signature of a registrar, when such certificate is produced. The certificate from the collector of customs at Montreal does not profess to be, and clearly is not, a copy of any entry in the register, and cannot be taken as evidence which the defendants can be called upon to rebut. The parol evidence as to John Shaw of Kingston having formerly been the owner of shares, and having represented the Kingston stockholders at Toronto *after* the vessel was lost, does not necessarily shew that he was at the time the wood was furnished by the plaintiff in any way interested in the vessel, or responsible for anything furnished for its use. Under these circumstances, I think the defendants who have moved are entitled to have the verdict set aside and a nonsuit entered; or if the plaintiff chooses to pay the costs of the last trial, perhaps the better way will be to grant a new trial, subject to such costs.

BURNS, J., concurred.

The rule was made absolute for nonsuit.

FRENCH ET AL. V. WEIR.

Arbitration—Agreement to refer—Mutuality—Agreement by one partner for the firm.

In an action on an agreement under seal to abide by an award; it is no objection in arrest of judgment that the submission is not stated to be mutual.

The declaration alleged that defendant agreed *with the plaintiffs* to refer.

Held, not supported by proof of an agreement made and executed by one plaintiff only on behalf of himself and the others, being his partners.

The plaintiffs declared in covenant upon a sealed agreement made on the 17th of June, 1858, whereby the defendant agreed to abide by the award of a certain arbitrator,

upon all matters in difference between the defendant and the plaintiffs in relation to a certain contract, so that the arbitrator "should make and publish his award within thirty days from the date of the said deed, but with power to the said arbitrator to enlarge the time for making his said award for one month longer, if he should see fit to do so." The contents of the deed shewed clearly that the question to be awarded upon was how much money was due from the defendant to the plaintiffs for work done, and how and when it should be paid.

It was averred in the declaration that on the 16th of July, 1858, the arbitrator enlarged the time until the 17th of August, following, and that he did, on the said 17th of August, make his award ready to be delivered, awarding £7273 3s. 1d. to be paid by defendant to the plaintiffs in the manner therein mentioned: that is to say, £4503 18s. 7d., part of the sum awarded, on or before the 21st of September then next, for which sum this action was brought.

The defendant pleaded, 1st. *Non est factum*.

2ndly. That the arbitator did not make and publish his award as in the declaration alleged.

The agreement began thus: "Memorandum of agreement made on the 17th day of June, 1858, between George Weir, of Edwardsburg, &c., of the one part, and Benjamin Gordon French, of Cornwall, &c., contractor, acting on behalf of himself and Austin Shearer, John Molson the younger, and William Kennedy, being the members composing the firm of French, Shearer and Company, of the other part." And then it proceeded to refer the differences between the parties to arbitration. It was executed by French and Weir alone.

The declaration set out that the defendant, by deed bearing date, &c., after reciting that certain differences had arisen between the plaintiffs and the defendant, which differences it was desirable to refer to arbitration, agreed with the plaintiffs to refer all matters in difference between the plaintiffs and the defendant, &c. The agreement to refer described these plaintiffs as members of the firm of French, Shearer, & Co., and shewed clearly on the face of it that the differences and claims to be referred were those growing

out of a certain contract between that firm and the defendant. And in the agreement French bound himself that the award should be faithfully performed and kept by the said firm, "as if they were individually parties to the agreement." The award directed the money to be paid to the firm of French, Shearer & Co.

At the trial at Cornwall, before *Richards*, J., the defendant's counsel objected that there was a variance between the deed declared upon and that produced, the declaration stating the agreement to be between the plaintiffs and the defendant, while that produced was between French alone and the defendant; and further, that the plaintiffs could not recover, because they had not proved a submission by all the plaintiffs, but only by French.

The learned judge reserved leave to move for a nonsuit on those objections; and a verdict was given for the plaintiff for £4561 18s. 2d.

Galt obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved; or to arrest the judgment, because the declaration did not allege any agreement on the part of the plaintiffs with the defendant to refer the matters in dispute between them, but only set forth an agreement on the part of the defendant.

J. S. Macdonald, Q. C., shewed cause, citing *Ferrer v. Oven*, 7 B. & C. 429; *Fishmongers' Company v. Robertson*, 5 M. & Gr. 131; *Smith v. Trowsdale*, 23 L. J. Q. B. 107, 22 Eng. Rep. 360; *Wilson v. Morrell*, 29 Eng. Rep. 345; *In re Milnes and Robertson*, 28 Eng. Rep. 362; *London and N. W. R. W. Co. v. Bedford*, 33 Eng. Rep. 92; *Pickard v. Sears*, 6 A. & E. 469; *Tyerman v. Smith*, 37 Eng. Rep. 66; *Great Western R. W. Co. v. Baby et al.*, 12 U. C. R. 114; *Adcock v. Wood*, 6 Ex. 814; *Hartley v. Huntley*, 4 C. P. 276; *Sidney Road Co. v. Holmes et al.*, 16 U. C. R. 268; 2 Saund. 62 *b*, note *f*; *Green v. Horne*, 1 Salk. 197.

Galt, contra, cited *Dilley v. Polhill*, Str. 923; *Antram v. Chace*, 15 East 209; *Skinner v. Holcomb*, 6 O. S. 336; 2 Saund. 61 *n*, note 2; *Stead v. Salt*, 3 Bing. 101; *Baby v. Davenport*, 3 U. C. R. 54; *Dresser v. Stansfield*, 14 M. & W. 822.

ROBINSON, C. J., delivered the judgment of the court.

There is no ground in our opinion for arresting the judgment in this case. The plaintiffs are not suing in debt or assumpsit upon an award merely. If they were they would have had to set out a mutual submission. The distinction is stated by Mr. Justice *Bayley* in the case cited by Mr. *Macdonald* of *Ferrer v. Owen* (7 B. & C. 427). What the defendant referred was the amount in which he was indebted upon the contract. We have no doubt that a party may legally enter into a covenant to pay to another whatever A. B. may find to be due by him in respect to certain work done.

There is nothing unlawful in such an agreement, and when the covenant is express there can be no doubt that it is binding. It is the common case of one person being bound by a deed to another, in which deed there is nothing stipulated to be done by the other party, and therefore no necessity for his executing the deed. This matter is fully discussed in the case of the *Fishmongers' Company v. Robertson* (5 M. & Gr. 131.)

Here French, one of the plaintiffs, did in fact execute the deed, acting, as he expressed it, for himself and the other members of the firm, who are the other plaintiffs on the record, but the objection is that the declaration only states a submission by one party as to the differences, and not a mutual submission. For the reasons we have stated, we think the record in that respect shews a good cause of action, for that one person may, if he pleases, covenant with another to pay him whatever sum A. B. shall find to be due by the party covenanting upon a written contract. There can, it is true, be no implied undertaking to abide by an award, except where there has been a mutual submission; and an alleged agreement by parol to abide by the award would be invalid for want of a consideration to support it, if there was no submission on the other side. But the principle does not apply in the case of a covenant like the present: and for the same reason we think the case of *Antram v. Chace* (15 East 209) is not applicable here.

The objection which was taken as the ground of nonsuit

at the trial is of another kind. It is contended that the effect of the deed is untruly stated in the declaration, and that there is in that respect a fatal variance between the covenant produced and that declared upon, in this, that the declaration avers the agreement to refer to have been made between the plaintiffs and the defendant, whereas the agreement in the deed produced is made by the defendant with French alone, and not with French and the other plaintiffs his partners. In its features this case much resembles that cited of *Stead et al. v. Salt* (3 Bing. 101), though as the award in that case was not sued upon, but was given in evidence on the part of the defendant, there was no question about variance, but simply upon the point whether the submission by one of several partners on behalf of himself and the others could be received as binding upon all, and the court held it clear it could not be.

The plaintiffs here have alleged that the defendant by the deed declared on agreed with the plaintiffs to refer all matters in difference between the plaintiffs and the defendant to the arbitration, &c. Now is that assertion verified by the deed produced? We think we must hold that it is not, for the defendant really did not agree with all the plaintiffs, but with French alone, though it is expressed that French was acting on behalf of himself and the other parties. What makes this case stronger against any one but French having a right to sue the defendant on this sealed agreement is, that the defendant makes French covenant by it, that his partners, as well as he, should be bound by the award, which shews that he well understood that the agreement, as to its legal effect, was between him on the one side and French alone on the other, though he probably thought that the other partners would not disavow what French had agreed to

The defendant ought not then to take such an objection on his part, but he has done it, and the law is too plain to admit of our disregarding the objection. We must hold that the plaintiffs did not prove an agreement made with themselves, as they have stated, and they therefore failed on the plea of *non est factum*. *Metcalf v. Rycroft*, 6 M.

& Sel. 75 ; Lord Southampton v. Brown, 6 B. & C. 718 ; Berkeley v. Hardy, 5 B. & C. 355 ; Bushell v. Beavan, 1 Bing. N. C. 120.

Rule absolute for nonsuit.

FARREL V. STEPHENS.

Evidence under commission—Mention of time and place—Evidence not taken as directed—Objection made too late.

Defendant having made one objection to evidence taken under a commission, which was overruled, allowed it to be read, and commented upon it.

Held, that he was precluded from taking any further exceptions.

Where the commission prescribes a particular time and place for taking the evidence, *quære*, as to the effect of neglecting this direction.

EJECTMENT, for lot No. 25 in the second concession of Thurlow, as reckoned by the western boundary, and in the third concession as reckoned by the eastern boundary.

At the trial, at Belleville, before *Draper*, C. J., a verdict was found for the plaintiff.

McMichael, for the defendant, obtained a rule on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, pursuant to leave reserved at the trial, on the ground that the evidence taken in Scotland under a commission from this court, to prove the plaintiff to be heir at law of the late Alexander Wood, Esquire, of Toronto, was inadmissible, for the reason that the commission directed the commissioner to take the evidence "at Stonehaven in Scotland, at some place and time to be appointed by the commissioner before the 1st of January, 1856 ; "and that some of the evidence was taken at West Drum, in the parish of Breethin, on the 5th of October, 1856, and the remainder of the evidence on the 30th of December, 1856, and 21st of May, 1857 ; or why a new trial should not be granted on the law and evidence.

In the same term *S. Richards*, for the plaintiff, obtained a cross rule on the defendant, to shew cause why the commission should not be amended, by striking out the directions as to the time and place of taking the evidence, such directions varying from the usual form of commissions in this

court, which do not in general contain any such directions, and because the judge's orders for the commission in this case did not require the insertion of any such direction, but the same was introduced inadvertently.

It was sworn in an affidavit made by Mr. Helliwell that he took out the commission, and objected at the time to the insertion of a time and place for taking the evidence, but he was told by the officer that it was the kind of form he had at the time : that the interrogatories annexed to the commission were served on defendant's attorney on the 23rd of August, 1855, the commission being sent to Scotland on the 15th of September following, and only returned in September, 1856 : that the commissioners were named by the plaintiff's attorney only in consequence of the defendant's neglect to name his commissioners within the time limited in the order (two months).

The order provided for four commissioners, each party naming two ; but the defendant's attorney having named none, the commission went to the two commissioners named by the plaintiff's attorney.

The judge's order for the commission gave no direction that either time or place for taking the evidence should be inserted in the commission.

S. Richards, for the plaintiff, cited *Field v. Woods*, 7 A. & E. 114 ; *Doe Gord v. Needs*, 2 M. & W. 129 ; *Henn v. Neck*, 3 Dowl. 163 ; *Abbott v. Parsons*, 7 Bing. 563 ; *Walker v. Needham*, 1 Dowl. N. S. 220 ; *Barber v. Frith*, 2 Jur. 470 ; *Williams v. Wilcox*, 8 A. & E. 314 ; *Foss v. Wagner*, 7 A. & E. 116 ; *Doe Phillip v. Benjamin*, 9 A. & E. 650 ; *Hibbert v. Johnston*, 6 O. S. 635 ; *Webb v. Taylor*, 1 D. & L. 676.

McMichael, contra, cited *Steinkeller v. Newton*, 8 Dowl. 579 ; *Ponsford v. O'Connor*, 7 Dowl. 866 ; *Greville v. Stultz*, 11 Q. B. 997 ; *Hawkins v. Baldwin*, 20 L. J. Q. B. 198 ; *Birnie v. Janson*, 2 G. & D. 630 ; *Hawkins v. Baldwin*, 16 Q. B. 375 ; *Evans v. Davies*, 5 Bing. N. C. 229.

ROBINSON, C. J., delivered the judgment of the court.

The statute does not expressly require that any time or place for examining witnesses abroad should be named in

the commission, but of course it should be settled, either by the judge's order, preceding the commission, or by consent of parties, when and where the witnesses are to be examined, otherwise the party who has not taken out the commission would not know how he is to proceed if he desired to attend. Here the defendant, though he received proper notice, did not desire to administer cross interrogatories, or to take any part in regard to the examination. He could therefore not have been prejudiced if no day or place had been named, as he would take no part in obtaining the evidence.

We hold, however, that it was not competent to the defendant to take these exceptions to the evidence under the commission, after he had allowed the evidence to be read, and had commented upon it, and had concluded his case. The plaintiff was summing up the evidence, and was replying to the defendant's case when the defendant first started the difficulty. The case of *Field v. Wood* (7 A. & E. 114), cited by Mr. Richards, is very strong on that point, and it is a principle constantly acted upon. The objection, too, that the defendant was too late then to raise the difficulty, is strengthened by the fact that he had at the proper time, after looking at the commission and evidence, taken another objection, which was over-ruled, but said nothing of this. If the evidence being read had turned out to be in his favour, he would have had the benefit of it, and therefore having allowed it to be read, so far as this objection was concerned, he ought not to be allowed to take the objection after he failed.

It is impossible that there can be a case in which there could be less claim to have the rule relaxed, for the plaintiff, who is suing here as heir of the late Alexander Wood, has had her claim as heir established in Scotland, where the family resided, after a protracted and expensive litigation, and the evidence under the commission related only to the single point of heirship, in which this defendant has really no interest further than to save himself from being turned out as long as he can, by throwing impediments in the plaintiff's way.

Rule discharged.

THE MUNICIPALITY OF THE TOWNSHIP OF KING V. HUGHES.

License fees received by reeve—Dispute between him and treasurer as to receipt by the latter—Settlement of accounts with the municipality—Subsequent action by them—Competency of treasurer as witness—16 Vic., ch. 19.

The reeve of a township received certain moneys for license fees, which, as he alleged, he paid to the treasurer, whose receipt he produced for part of the sum in cash and a note for the balance. The treasurer denied having received the note or balance, and at his instance the municipality, by resolution, allowed an action to be brought for it in their name against the treasurer. They afterwards rescinded this resolution, but the action went on; and at the trial it appeared that the whole sum had been charged by the treasurer to himself in his accounts for the year, which, as well as the accounts for three subsequent years, had been audited and passed, shewing a general balance for that and the other years due by the treasurer.

Held, that the action could not be maintained by the municipality; and that, if it could, the treasurer would not have been admissible as a witness.

ACTION on the common counts, including a count for money had and received.

At the trial, at Toronto, before *Hagarty, J.*, it appeared that the defendant Hughes, as reeve of the township, received the money paid in 1854 for shop and tavern licenses, auctioneers' licenses, a circus license, and for fines, amounting in all to £215 7s. 6d. This amount it was admitted he was paid by the persons who received the licenses, and his duty was to pay it to the treasurer of the township, who had to account to the municipality.

The defendant contended that he had paid the whole amount to the treasurer, and he produced a receipt from him, dated the 15th of January, 1855, for £91.6s. 7d. on account of these moneys, in which receipt it was also stated that the defendant had given him, the treasurer, his note for the balance, £125 os. 11d.

The signature of the treasurer to that receipt was proved at the trial, and the treasurer, who was called as a witness for the plaintiffs, also admitted it to be genuine, but denied that he had ever received such a note, or that he knew of any words about the note being in the receipt when he signed it. He admitted that he had been paid by the defendant some small sums on account of the unpaid balance of £125 os. 11d., but affirmed that £93 was yet due to him by the defendant.

On the defendant's part evidence was given of the pay-

ment by him of the amount of the note, but perhaps not conclusive, though it was proved that so lately as last spring the treasurer, being asked whether it was true that the reeve, this defendant, had any of the township money in his hands, declared that it was not true.

Altogether the evidence given by the treasurer, who, though objected to by the defendant as incompetent, was allowed to be examined, and the evidence given on the other side, including the receipt, left it as a question which it would be necessary to submit to the jury, whether the defendant had or had not paid the £216 7s. 6d. in full to the treasurer, as he insisted he had.

But the defendant, besides objecting that Wood was an incompetent witness, denied that the plaintiffs, the municipality of King, could have any right of action against him, because he produced the account of the treasurer, Wood, rendered by him to the municipality in 1855, of his receipts and disbursements for the year 1854, in which account he charged himself with the whole amount of duties, £216 7s. 6d., as received by him, and his account was audited and certified to be correct. It admitted a balance of £114 2s. 11½d., in his hand on his general account with the township, which included all these fees or licenses.

The treasurer also admitted that he had settled in full with the defendant for the following years, 1855, 6 and 7, and had said nothing to defendant about any claim upon him for an unpaid balance for 1854. The treasurer subsequently fell largely in arrear for other moneys of the township, and lately came to the conclusion, as he swore, that the defendant was yet in arrear to him, on account of the duties, in the sum of £93, which was claimed in this action. The municipal council, when he made this statement to them, remarked that he must have kept his books very inaccurately, or he could not have been ignorant of this claim when he made his subsequent settlement with the defendant, yet they did at first pass a resolution, at his instance, permitting their name to be used in an action against the defendant for enforcing the claim, as if the defendant were directly accountable to them, which, as the

treasurer probably thought, would give him the advantage of having his own testimony received in the suit, as he would not be a party to the record.

The Municipal Council afterwards, on reflection, rescinded that resolution, but the treasurer nevertheless had this action still brought in the name of the Council.

The learned judge had great doubt whether the treasurer, Wood, was not inadmissible as a witness, on the ground that this was an action plainly brought on his behalf and at his request, and that he was within the exception in the clause of the statute ; and he further considered that the question of payment or non-payment of the whole amount of license fees for 1854, was, under the circumstances, a question that could only be raised between the defendant and the treasurer, for that the council, after having settled their accounts with the treasurer, accepting the balance which he stated in that account to be correct, and allowing it to be carried on to the following year, had acquitted the treasurer of these sums with which he had charged himself ; and whatever claims they might have upon him, as resulting from the present state of their accounts with him, they were not in a situation to treat this defendant as their debtor for any part of the same moneys.

The learned judge, however, reserving leave to the defendant to renew the objections he had taken, desired the jury to find whether the defendant had in fact paid the whole £216 6s. 7d., or whether there was still such a balance due as the treasurer stated.

The jury found for the plaintiffs for the £93.

It was proved that the treasurer had been dismissed from his office as being unsatisfactory. He swore that he had paid the whole sum he now claimed to the municipality, supposing then, and long after, that he had received it ; and that if this action should fail he would lose the amount,

Connor, Q. C., obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved.

M. C. Cameron shewed cause, citing *Jones v. Broadhurst*, 9 C. B. 173 ; *Pritchard v. Hitchcock*, 6 Scott N. R. 866.

ROBINSON, C. J., delivered the judgment of the court.

There is no question upon this motion for nonsuit as to the right in the nominal plaintiffs to call the treasurer Wood as a witness, or we think we must have taken the same view of it as we apprehend the learned judge did at the trial, though not feeling altogether confident upon the point he received his evidence for the time, as is usually the course. He was not, we think, admissable, for the action was in truth his, not only in the effect it must have upon his pucuniary interest, but it was instituted in fact by him, after the nominal plaintiffs had refused to sanction it, and has been carried on by Wood in their name on his own account. But taking the case to be altogether as he stated it, the plaintiffs' action in our opinion failed. The treasurer was the person accountable to the plaintiffs for the license money, though of course only for such sums as he received. The defendant Hughes, who received the duties from the persons licensed, had to account for them to the treasurer. This payment to the treasurer acquitted him, and now that a dispute arises upon the question of fact whether he did pay the money to the treasurer or not, it is an action brought against him by the municipality that the question is presented. They, not the treasurer, are seeking to charge him, and the evidence in our opinion incontestably shews that the municipality can have no right to bring an action for these moneys, for whatever may be the truth of the case as between the late treasurer and the defendant, the municipality have nothing more to claim, for they have long ago received these duties from the late treasurer, by his having rendered accounts to them in which he has charged himself with those duties as being actually received by him, and those accounts have been audited and passed, and also those of two succeeding years ; and although there may have been a balance of money stated by the treasurer to be in his hands when he rendered the last account of the series, which money it seems it was not really in his power to produce, yet that balance had no visible connexion with the sum claimed in this action ; on the contrary, the small balance stated to be in hand in the account for 1854 was

carried on and charged by the treasurer against himself in his subsequent account, and so in the following year ; and it is impossible for the council to set up that they have not in fact received this money, for the treasurer, acting as if he had received it, has accounted for it, and in effect paid it, though he may be yet in arrear with regard to subsequent receipts. And it is plain from the evidence given at the trial that the municipality do not in fact conceive that they have any claim, but admit themselves to have been paid the very sum in question. The whole conduct of the late treasurer indeed shews that he had made the debt his own, for the only question to be tried was whether the promissory note, which the treasurer had taken from the defendant, had or had not been paid. It would certainly place sub-accountants in a singularly unsafe position, if the public officer to whom they are to account should be at liberty to make a private arrangement of this kind with them, should in consequence act as if the money had been paid into his hands, and after acknowledging such actual payment in his accounts, and charging himself with the money, should be allowed at any length of time afterwards to open accounts between him and the municipality which had been audited and passed for years, and to set up a demand in the name of the municipality against the sub-accountant, and offer himself as a witness to prove that he had never in fact received the money which he had charged himself with.

In our opinion the rule for nonsuit should be made absolute.

Rule absolute.

SHAW V. ROSS.

Sale of land—Lien for purchase money—Judgments against seller—Equitable defence.

To an action for the purchase money of land sold and conveyed, defendant pleaded, by way of equitable defence, that the plaintiff retained a lien on the land in equity for the price, and had an interest by reason of such lien, which might be bound by judgments : that two judgments had been recorded against the plaintiff and remained unpaid, for an amount exceeding that sued for.

Held, on demurrer, no defence.

ACTION for money payable for land sold and conveyed by the plaintiff to defendant.

Plea, on equitable grounds, that the plaintiff did not take from the defendant any security whatever for the payment of the purchase money, nor in any way part with, waive, or destroy his lien upon the said lands therefor, but remained possessed and entitled in equity, by reason of such lien, of and to an interest in the said lands, to the extent of the said money, and had a disposing power over such his interest, which he might, without the assent of any other person, have exercised for his own benefit, and had power to charge the same with the amount of the judgment debts hereinafter mentioned, and interest : that after the said sale, and while the plaintiff was so possessed and entitled, to wit, on, &c., a judgment was entered up against him in the court of Common Pleas, at Toronto, for the sum of, &c., in a suit wherein one John McGill Chambers and one Peter Farrell were plaintiffs, and the now plaintiff and one Andrew P. Shaw were defendants ; and also after the said sale, and while the said plaintiff was so possessed and entitled, to wit, on, &c., another judgment was entered up against the plaintiff in Her Majesty's Court of Queen's Bench for Upper Canada, at Toronto, for, &c., (naming the amount and parties,) and certificates of the said judgments were, to wit, on, &c., duly registered in the registry office of the county of Prince Edward, where the said lands were situted, whereby the said Judgments became a charge upon the lien of the said plaintiff for the said moneys, and the said judgment creditors became entitled to such and the same remedies in a court of equity against the said land and messuages as the plaintiff should have been entitled to in case he had by writing under his hand agreed to charge the said lien with the amount of said judgment debts and interest : that the amount of the said judgment debts and interest exceeds the amount claimed by the plaintiff in this action, and that the said judgment debts and interest remain wholly due and unpaid ; wherefore the defendant says that the plaintiff ought not in equity to have or maintain his action against the defendant for the said moneys.

Richards, for the demurrer, cited 13 & 14 Vic., ch. 63, sec. 2 ; *Mines Royal Societies v. Magnay*, 10 Ex. 489 :

Wodehouse v. Farebrother, 5 E. & B. 277 ; Clerk v. Laurie, 1 H. & N. 452 ; 4 Jur. N. S. 13.

C. S. Patterson, contra, cited Harris v. Davidson, 15 Sim. 128 ; Chilton v. Carrington, 16 C. B. 206.

ROBINSON, C. J., delivered the judgment of the court.

The effect of the defence set up by this plea would be that the plaintiff would get nothing for his land, which the plaintiff has sold and conveyed to the defendant, and which for all that appears, the defendant is enjoying; because, in consequence of this defendant not having paid him hitherto, the plaintiff has in equity a lien on the land, and because there are judgments against him which constitute a charge upon that lien, and so may be enforced to the prejudice of the defendant as owner of the land, which, according to his own account, he has not paid for.

If the defendant has any fear of such a lien being enforced to his prejudice, he has only to pay the purchase money, which it is the object of this action to compel him to do.

It would be strange indeed if this could be held as constituting an equitable defence.

Judgment for the plaintiff on demurrer.

SINCLAIR AND BURROWES V. THE TOWN COUNCIL OF THE TOWN OF GALT.

Building agreement—Over payments—Set-off—Amendment.

In an action on a building agreement, defendants pleaded a set-off equal to the plaintiffs' claim, for money had and received, &c., and it appeared that they had in fact over-paid the plaintiffs for the work. The jury found a verdict in defendants' favour for the excess, contrary to the judge's charge.

The court refused to amend the plea, so as to claim the sum given, 1st, because such an amendment could not properly be granted, at least without a new trial ; and 2ndly, because the amount over-paid would not form the subject of a set-off.

The plaintiffs sued upon a building agreement, for moneys alleged to be due to them for erecting and completing a town-hall in the town of Galt. The declaration contained also a count for work and labor, money paid, and on account stated.

The defendants, besides other pleas, pleaded to the common count an ordinary plea of set-off, stating that the plaintiffs were indebted to the defendants *in an amount equal* to the plaintiffs' claim, for money paid by the defendants to the plaintiffs, money received by plaintiffs to the use of the defendants, and for money due on account stated, which amounts the defendants were willing to set-off against the plaintiffs' claim.

At the trial at Berlin, before *Robinson, C. J.*, the plaintiffs abandoned the special count on the agreement, the work not having been finished by the time limited, nor done according to the specifications.

It appeared that the plaintiffs were to have had for the whole work, according to the contract, £3450, and they had been paid in fact £4788. The alterations were such as could have occasioned but little if any addition to the cost, taking the contract prices as the guide. There had been no mutual dealings between the parties on any other account. There was only the work done on the one side, and payments made on account of it on the other.

The fact of the plaintiffs having been paid so large a sum beyond the contract price, was accounted for upon the trial by stating that the payments were made monthly, upon the estimate of work as measured in the building, and that this measurement over-ran that on which the contract was based.

According to the evidence the plaintiffs had been paid much more than the value of the work, as it stood, though they left it in an incomplete state, and it was finished by others at the expense of the council.

The defendants, upon the evidence, claimed a verdict in their favour for the amount which they had paid beyond the value of the work, whether estimated by the scale of prices in the contract, or independently, by respectable builders who had valued it. The plaintiffs, on their part, objected that as the pleadings stood the defendants could not have a verdict in their favour for damages, but merely a general verdict, if the jury should find nothing due to the plaintiffs.

In summing up at the end of the case, the jury were told that they could not find in favour of the defendants for any

sum, but had merely to determine whether they should find in favor of the plaintiffs for any, and what amount, or a general verdict in favour of the defendants. They found, however, a verdict in the defendants' favour for £500.

M. C. Cameron, for the defendants, obtained a rule *nisi* to amend their plea of set-off, so as to claim by it whatever balance there should appear on the evidence to be in their favour, and thus uphold the verdict. He cited *Parsons v. Alexander*, 5 E. & Bl. 263.

And *Cameron, Q. C.*, (*Martin* with him) for the plaintiffs, obtained a cross-rule for a new trial, or to reduce the verdict to a simple verdict in favour of the defendants.

ROBINSON, J. C., delivered the judgment of the court.

We make absolute the plaintiffs' rule to strike out that part of the defendants' verdict which gives them £500 damages; and discharge the rule *nisi*, obtained by the defendants to amend their plea.

We should not probably in any such case amend the plea of set-off after the trial, and certainly not without granting a new trial, in order that the plaintiffs, having notice before trial of the claim intended to be urged to damages in favour of the defendants, might have a fair opportunity of meeting it.

But in this case there is the further difficulty, that any sum over-paid by the defendants is really not the foundation of a legal claim in the nature of a set-off.

There were no mutual dealings between the parties; no money was paid by the defendants to the plaintiffs except on account of this contract. And although the plea of set-off does contain a claim for money had and received, yet that would not extend to a sum of money paid in satisfaction of the cause of action, but to money had and received on some other account, and in such an action by the defendants it would be a question whether a sum paid, as this was, by the defendants with a knowledge of the circumstances, could be recovered back.

THE MUNICIPALITY OF THE TOWNSHIP OF LONDON V.
THE GREAT WESTERN RAILWAY COMPANY.

Assessment of property not assessible—Defence to action—Court of revision.

Where the assessors illegally assessed the superstructure of a railway as well as the land occupied by it—*Held*, that the company might defend an action as to the superstructure, although no appeal had been made to the court of revision and although the whole was called land in the assessment.

The declaration stated that a tax, amounting to £128 12s. 11d., was duly assessed against the defendants, in and for the township of London, for the year 1856, of which the defendants had due notice; yet the defendants, although the said sum of £128 12s. 11d. had been duly demanded, had refused or neglected to pay the same, whereby an action had accrued to recover the same with interest, as a debt to the township.

Pleas.—1. Not indebted, except as to £6 15s. 5d. 2. Except as to £6 15s. 5d., the defendants say the assessor or assessors for the township for the year 1856 did not deliver at or transmit by post to any station or office of the defendants a notice of the total amount at which they had assessed the real property of the defendants in the said municipality, distinguishing the value of the land occupied by the road, and the value of the other real property of the company. 3. Payment of the £6 15s. 5d. into court, which the defendants say is sufficient to satisfy the plaintiff's claim.

A fourth plea was allowed to be added at *nisi prius*, but the plaintiffs demurred to it (a).

The plaintiffs took issue upon the first and third pleas, and as to the second, replied that they did give due and proper notice to the defendants as by law required, but did not distinguish, as in the plea alleged, because no other property than that covered by the road bed was assessed or referred to or known to be then owned by the defendants.

At the trial, at London, before *Burns*, J., an extract from the assessor's roll of the township of London for the year 1856, certified by the town clerk, was put in, and was

(a) See the plea and demurrer, post, page 267.

proved by the town clerk to have been extracted by him from the roll, which shewed the defendants to be assessed for total value of real property £9,500, the total amount to be collected £128 12s. 11d. The number of acres assessed was about 170. The assessor for the township proved that in 1856 he, in making the assessment of the value of the 170 acres occupied by the railway—that is, the track between the fences—took into consideration the value of the fences, the iron rails, the ties laid down, and other matters in the construction of the railway, and thus made the total value of real property for assessment amount to £9,500. He proved that the other lands adjoining the railway track in the township were for the same year assessed at an average of £3 15s. to £4 per acre. In 1856 the defendants, it appeared, did own some other land in the township, other than that used for the track, but it was not known to the assessor for that year, or to the solicitor of the company, who, in 1857, furnished the list of lands for taxation. The assessor proved that some ten or twelve days before the 5th of May, which was the day for the court of appeal to meet, he deposited in the post-office at London, directed to C. J. Brydges, Esquire, Hamilton, manager of the Great Western Railway Company, a notice as follows:—

“London Township,

“Great Western Railroad Company.

“Take notice that your assessment for this year is as follows :

“Appeal 5th of May.

Personal property.....

Taxable income.....

Real property.....£9,500 0 0

“H. RIGNEY, Assessor.

“———, 1856.”

Becher, Q. C., for the defendants, moved for a nonsuit at the trial, upon these grounds: 1. That the plaintiffs could not maintain an action of debt for the taxes against a non-resident. 2. That there was no evidence of any by-law establishing any rate imposed, and that the transcript from the collector's roll did not shew any particular rate. 3. That

it was shewn by the evidence of the assessor that he had assessed the defendants upon a principle contrary to law : that taking the average of the value of land adjoining, the assessment of the rate should only have been to the amount the defendant paid into court. 4. That the notice put in and proved was not a sufficient compliance with the provisions of the assessment laws.

The learned judge submitted to the jury to find whether such a notice as stated was or was not posted at London, directed to Mr. Brydges, as stated, and at the time stated ; and the jury found that it had been.

A verdict was entered for the plaintiffs, for £136 7s. 6d., being for the balance of the £128 12s. 11d., after deducting the amount paid, £6 15s. 5d., and £14 10s, for interest. Leave was reserved to the defendants to move the court to enter a nonsuit, or a verdict for the defendants, and also to reduce the verdict by deducting therefrom the interest, £14 10s., if the court should decide against interest being allowed.

Irving, obtained a rule *nisi* accordingly. The first point taken was abandoned. He cited 16 Vic., ch. 182, sec. 45 ; *Charleton v. Alway*, 11 A. & E. 993 ; *Milward v. Caffin*, 2 W. Bl. 1330 ; *Kennedy v. Burness et al.*, 15 U. C. R. 491.

Connor, Q. C., and *Eccles*, Q. C., shewed cause, citing *Great Western Railway Company v. Rouse*, 15 U. C. R. 169 ; *Municipality of London v. Great Western R. W. Co.*, 16 U. C. R. 500.

ROBINSON, C. J.—Upon the pleadings and evidence, as stated by Mr. Justice Burns, who tried the case, I am of opinion that a verdict for defendants should be entered. The case of *Milward v. Caffin*, cited for the defendants, (2 W. Bl. 1330), is express upon the points that have been raised here, shewing that when that has been assessed which could not be legally assessed, the objection becomes a very different one as to its consequences from that of a mere over-valuation. (*Charleton v. Alway*, 11 A. & E. 993).

In the case of the *Great Western Railway v. Rouse*, (15 U. C. R. 168), we determined that according to the

Assessment Act, 16 Vic., ch. 182, sec. 21, it was the land only over which the railway ran, and not the superstructure erected upon it—that is, the land exclusive of the iron rails and ties—that was to be assessed. It is clear the plaintiffs had no right to assess the superstructure through their officers, and they cannot recover the rate thus illegally imposed. It is of no consequence to determine whether the rate being in the greater part illegal was illegal altogether, and so could furnish no ground of action, even for the amount that might have been legal, because here an amount sufficient to cover the rate on the land alone has been paid into court, and the plaintiffs are going only for that part which was clearly illegal, and must therefore fail.

BURNS, J.—I am of opinion that this rule should be made absolute. This court, in the case of *The Great Western Railway Company v. Rouse* (15 U. C. R. 168), afterwards affirmed on appeal, decided that taxing a railway company for the superstructure, such as the iron rails, bridges, &c., upon the track of the road was illegal, upon the proper construction to be given to the 21st section of 16 Vic., ch. 182. In that case the assessor had separated the value of the land from the value of the road-way superstructure, and the parties had carried the matter to the court of revision, and afterwards to the judge of the county court, who still preserved the mode of taxation, but reduced the amount. It was held, however, to be altogether illegal to adopt such an assessment against the railway company, and that the liability was for the actual value of the land occupied in the road according to the average value of the land in the locality. In this case the assessor, in his return upon the assessment roll, and his notice to the defendants, says nothing about the superstructure, but gives it to be understood that he merely assesses the value of the land. The defendants have paid into court the rate according to the average value of land in the locality, and pleaded that they are not indebted beyond that amount. The assessor proved in this case that he acted in fixing the value of the land, not according to the average value of land in the locality, but according to the

same principal adopted in the case of the Great Western Railway Company v. Rouse. The defendants here did not appeal to the court of revision at all ; and the question is, whether they are now too late to make the objection. I do not think they are too late. It is true the 26th section of the act says, that the roll as finally passed by the said court, and certified by the clerk as so passed, shall be valid, and shall bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll. A similar provision was contained in the act under which the case of Charleton v. Alway (11 A. & E. 993) was decided, and held not to prevent the party resisting the payment. The distinction where it is necessary to appeal, and where the claim may be resisted by an action of trespass or replevin, is this : if the power existed to make the assessment, then there is a jurisdiction in those doing it, and in such case the remedy is by appeal only ; but if the assessment be illegal, then there is no jurisdiction to do it, and in such case the person resisting is not compelled to resort to the remedy of appeal, but may resist the illegal exaction. The usual course has been for the claimants of the rate to resort to the summary remedy of distress, and then the question is brought up in an action of replevin or trespass. Here the plaintiffs preferred to bring their action, and the defendants have answered that they are not indebted beyond a certain sum, which they pay into court. It appears to me it is as proper a method of trying the legality of the assessment as any other of those adopted. I do not think the circumstance of the assessor making the assessment as he did alters the case, for he seems to have acted upon his own idea of what constituted the value of the land, and the plaintiffs have adopted it and wish to enforce it. If people were obliged to submit to an arbitrary mode of making the assessment, and so compelled to go to the court of revision for redress, rather than take the opinion of the law courts upon the illegal act of the assessor, it might lead to great inconvenience and hardship, besides holding the door open to injustice being perpetrated by assessors ; and as the rolls are revised by a court of revision formed from the members

of the council, they should not adopt an illegal assessment. The court of revision, if they indeed looked over the roll at all, would immediately see the discrepancy in the assessed value of the land of the company per acre compared with those in the same locality; and if any enquiry had been made from the assessor why he did so, the court would at once have learned that the assessment had, though the assessor called it only land, been made upon an illegal principle. I do not think the assessor could drive the defendants to the court of revision as a matter of necessity by calling that land which was not land.

I refer to *Milward v. Caffin* (2 W. Bl. 1330), *Marshall v. Pitman* (9 Bing. 595), and *Governors of Bristol Poor v. Wait* (1 A. & E. 264).

MCLEAN, J., concurred.

Rule absolute.

It is no defence to an action for taxes that defendants' property was rated higher than the average value of land in the locality, as assessed for the same year: the only remedy in such a case is by appeal to the court of revision.

The fourth plea, added at the trial, was as follows: And for a fourth plea to the said declaration, except as to the said sum of £6 15s. 5d., parcel, &c., the defendants say that they are a railway company, and that such part of the property of them, the defendants, as is situate within the plaintiffs' municipality is such as is occupied by their road or railway only, and that the same is rated higher upon the assessment roll for the year 1856 (from which said assessment roll the rate was assessed upon the property of the defendants to the amount claimed) than the average value of land in the locality is assessed upon the assessment for the same year.

The plaintiffs demurred to this plea, assigning as grounds of demurrer, that the defendants, having been duly notified and assessed, as is averred in the declaration, ought, if they considered themselves aggrieved by the said assessment, to have appealed against it, in the manner provided by the Consolidated Assessment Act of Upper Canada, 1853, and

are not now entitled to raise the objection in the said fourth plea set forth ; also, that the said fourth plea sets up matters as a defence to this action which could only be available to the defendants for the purpose of reducing or otherwise rectifying their assessment, in pursuance of the provisions of the said Consolidated Assessment Act of Upper Canada, 1853.

The demurrer and rule were argued together.—See page 264.

ROBINSON, C. J.—For all that is stated in the plea demurred to, the only objection to the plaintiffs' recovery intended to be relied on, is that the assessors estimating the land alone have valued it too highly. If this plea, as it stands, would be a good defence, then every action for a rate might be met by a similar plea, which would in effect be an appeal from the court of revision to a jury. This, of course, is out of the question, for it would be repugnant altogether to the enactment which makes the decision of the court of revision final upon the mere question of value. What the defendants meant to set up as a defence no doubt was, not that the assessors valued too highly any thing that it was their duty to value, but that they assessed and valued something which they had no right to assess, and have thereby brought an illegal charge upon the defendants in a matter in which they had no discretion to exercise. The plea, however, does not disclose such a case, but complains merely of an over-valuation of what, for all that appears in the declaration or plea, was rightfully assessed.

The plaintiff is entitled, in my opinion, to judgment on this demurrer.

BURNS, J.—The plea it is clear, I think, cannot be sustained. It can be no answer to the demand to say that except as to £6 15s. 5d. the land occupied by the road is rated higher upon the assessment roll for the year 1856 than the average value of land in the locality is assessed at for that year. The average value of land is an undefined term, and this court, through the means of a jury, is not constituted a tribunal to ascertain that fact. It may be

that the assessor perhaps put a few shillings more per acre, or otherwise, on the road-way than upon other persons' lands in the locality, but it never could have been supposed that the defendants for that reason could resist the payment of the rates altogether, or could thereupon propound a question of the nature suggested by this plea for the court to determine—namely, whether the lands of the company were or not rated higher than others. The 26th section of 16 Vic., ch. 182, provides the remedy when a party complains of an over-charge by the assessors. The defendants cannot abstain from that remedy, and call upon the court to try by a jury what the amount should be fixed at upon which the rate is to be paid. The plea does no more than shew a defect in the mode of assessment, and not that which would make the assessment a nullity.

MCLEAN, J., concurred.

Judgment for plaintiffs on demurrer.

IN THE MATTER OF CROFT AND THE MUNICIPALITY OF THE TOWNSHIP OF BROOKE.

By-law—Want of seal.

The court refused to quash a by-law on the ground that it had not been sealed, as without the seal it could not be treated as a by-law.

J. Wilson, Q. C., obtained a rule *nisi* to quash by-law No. 73 of this municipality. One of the objections taken was that the by-law was not sealed with the seal of the municipality, and the clerk swore that it had not at the time of this application, and never had the seal of the municipality attached to it.

ROBINSON, C. J., delivered the judgment of the court.

The statute 12 Vic., ch. 81, sec. 198, requires that by-laws of municipal corporations shall be authenticated by the seal of the corporation. If this is not sealed, and it appears that it is not and never was, it follows that what we are asked to set aside is not a by-law, and we have no power to quash it, nor is there any need that it should be quashed.

Rule discharged.

MCDONALD V. PECK.

Ejectment for non-payment of rent—Distress—C. L. P. A. sec. 263—Acceptance of rent—Appropriation of payments.

Where the lease expressly provides that it shall be void on non-payment of rent, *whether demanded or not*, the C. L. P. A., sec. 263, does not apply and in ejectment for the forfeiture there is no necessity to shew a want of distress.

Held, however, that if it had been otherwise, in this case, on the evidence stated below, absence of distress was sufficiently shewn.

Defendant gave a note for the rent due up to the 1st of December, 1856. He afterwards obtained a note of the plaintiff's for £28 15s. and being unable to pay his taxes gave it to the bailiff before it fell due, telling him to ask the plaintiff to advance the sum required, and to credit the balance on the then current rent. The plaintiff's clerk advanced the money and took the note, but refused to credit the balance on the rent then accruing, saying that he would apply it on the previous note given by defendant, which remained unpaid.

Held, that there had been no acceptance of rent due after December, 1856, so as to waive the forfeiture.

EJECTMENT by landlord against tenant for the front part of lot No. 3 in the Maitland concession of the township of Goderich, containing 18 acres.

At the trial at Goderich, before *Burns, J.*, the facts appeared as follow :

The plaintiff, by lease, dated the 14th of November, 1848, leased to the defendant 18 acres of the lot mentioned, being the field then in grass, and enclosed with a rail fence on the front of the said lot adjoining the northerly side of the Huron road, for the term of 15 years, to commence on the 1st of December, 1848, subject to the determination or cesser of the term before the expiration thereof under the proviso or conditions in the lease contained, paying the yearly rent of £15 per annum for the first ten years, and £20 per annum for the remaining five years, the rent payable half-yearly on the 1st of June and 1st of December in each year. This action of ejectment was brought for non-payment of the rent.

The lease contained covenants for payment of the rent, and a proviso in these words : "Provided always, and it is hereby agreed, that if the rent hereby reserved, or any part thereof, shall at any time or times during the said term be in arrear or unpaid for the space of sixty days next after the day whereon the same shall become due, according to the reservation thereof hereinbefore contained, *whether the*

same be demanded or not, or in case of breach or non-performance of any or either of the covenants herein contained on the part of the said lessee, his heirs, executors, administrators and assigns, to be observed and performed, then, and in either of the said cases, the present indenture, and every clause, matter and thing therein contained, and the term hereby granted shall cease, determine, and be absolutely void to all intents and purposes whatsoever, and the said John McDonald, his heirs, executors or assigns, shall thereupon hold the said lands and premises utterly discharged of this lease, and of all covenants and provisos herein contained, without the payment or allowance by the said John McDonald or his aforesaid, of any sum of money whatsoever to the said lessee or his aforesaid, or any tenants or occupiers of the said land, or for any houses, buildings, and improvements erected or made by the said lessee or his aforesaid, or the tenants or occupiers of the said land and premises, or any part thereof."

The action was commenced on the 28th of August, 1858. The defendant had allowed the rent to be in arrear up to the 6th of August, 1856, and on that day he gave the plaintiff his promissory note for the £130 Os. 9d., for which the plaintiff gave him a receipt in these words: "Received, Goderich, 6th of August, A.D. 1856, the promissory note of Mr. Leonard Peck for one hundred and thirty pounds and nine pence, currency, as the full amount of the balance in my favour, payable the first day of December next, for rent of field of nursery land. J. McDonald." This note the plaintiff discounted at the bank of Upper Canada, but after it became due the plaintiff was obliged to retire the same himself, and the defendant had never paid any part of it. Subsequently to this, in 1857, the plaintiff purchased a reaping machine from the defendant, who was an agent for the sale thereof, and had given his promissory note for the sum of £28 15s., and this note was in the possession of the defendant. Before it became due a bailiff of the collector of taxes had a warrant of distress for £10 17s. taxes against the defendant, which sum the defendant could not pay, but he gave the plaintiff's promissory note for the £28 15s. to the bailiff, telling him to ask the plaintiff to advance him

the £10 17s., though the note was not then due, and to give him credit on the rent then running on the current year for the residue of the note. The bailiff received the note, and went to the plaintiff's clerk, who advanced the £10 17s. to the bailiff and took the note. The bailiff wished that credit should be given to the defendant for the remaining sum due on the note on account of the then current rent, but the clerk refused that, and said he would credit it on the former demand upon the defendant's note, which it was said was then in the shape of a judgment in favour of the Bank of Upper Canada, but which was not proved in any way. The bailiff left the plaintiff's note, however, with the plaintiff's clerk, on receiving the £10 17s., and it was left without any further settlement between them whether it should be credited on the rent, or on the note given for the rent, the clerk refusing to receive it except giving credit for it on the note. Subsequently to this, in July, 1858, the defendant enclosed in a letter the sum of £4 15s., and deposited it in the post-office, which letter came to the hands of the plaintiff's clerk. The letter could not be found, but from the evidence of the witness employed by the defendant to transact the matter for him, there was no specific appropriation of £4 15s., but it was expressed to be *on account of rent*.

The defendant's counsel contended that this £4 15s., and the balance due on the plaintiff's promissory note, should be applied to the rent falling due after the 1st of December, 1856, and then it would stand thus :

The plaintiff's note	£28 15	
Less paid the bailiff	10 17	
	<hr/>	£17 18
Then the year's rent, from the 1st of December, 1856, to the 1st of December, 1857		15 0
Leaving over-paid, to be applied on the rent due on the 1st of June, 1858		2 18
Enclosed by letter in July		4 15
		<hr/>
		£7 13

thus paying the rent due to the 1st of June, 1858; and that this must be taken to be a waiver of any forfeiture previous to that time.

It was further proved that the premises were occupied by the defendant as a nursery garden of young trees, and there were no buildings upon the land; the whole piece of ground adjoined the road side, and every part of it could be distinctly seen from the road: that it had been seen by the witness often, and just before the action brought, and there was nothing upon the premises which could be distrained for rent then or at any time.

The learned judge told the jury that in his opinion there was no appropriation agreed upon with respect to the balance due on the promissory note of the plaintiff: that the note was not due when given up to the plaintiff, and if there was no appropriation of it, the plaintiff might apply it to a previous demand, which it appeared the defendant's agent was told would be done: that though the agent wished it otherwise applied, yet he left the note with the plaintiff after he was told the plaintiff would not apply it as he wished: that if it had been a sum of money left, and left with directions how it was to be applied, the case might have been different, but here the defendant wished the favour of a payment of money in advance before the note was due, and if he chose to take the money upon the terms the plaintiff dictated with regard to the appropriation of the residue, he could not afterwards claim that it should be considered as payment of rent falling due, because he wished it, or because the agent said defendant wished it, so applied: that with respect to the £4 15s., even supposing that it should be applied to the rent after the 1st of December, 1856, rather than upon the previous rent, yet there was more than six months' rent due before action brought.

The jury found a verdict for the plaintiff.

Prince obtained a rule to shew cause why there should not be a new trial, on the grounds that there was no sufficient evidence of no distress upon the premises, and that the verdict was contrary to law and evidence, and for misdirec-

tion, there being no sufficient evidence that six months' rent was in arrear, and the forfeiture or right of the plaintiff to possession being waived by his subsequent acceptance of rent.

Christopher Robinson shewed cause, and cited C.L.P.A., sec. 263 ; *Doe Harris v. Masters*, 2 B. & C. 490 ; *Doe Nash v. Birch*, 1 M. & W. 402 ; *Croft v. Lumley*, 31 L. T. Rep. 382 ; *Clayton's Case*, 1 Mer. 608 ; Arch. L. & T. 104 ; *Rosc. N. P.* 653 ; *Smith L. & T.* 112-114 ; *Platt on Leases*, II 128 ; *Woodf. L. & T.* 277 ; *Jones v. Carter*, 15 M. & W. 725 ; *Doe Smelt v. Fuchau*, 15 East 286 ; *Parrott v. Anderson*, 7 Ex. 93.

Prince, contra. cited *Smith v. Doe dem. Jersey*, 2 B. & B. 514 ; *Doe Smelt v. Fuchau*, 15 East 286 ; *Parsons on Contracts*, 142 note.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff's right to bring ejectment in this case if the rent should be in arrear for sixty days, and without making any formal demand, is given by the terms of the lease, independent of any statute : and in such case there is no occasion to shew that there was no distress on the premises.

This is not a forfeiture of the term created by any statute, but by the agreement of the parties, which is, that on the tenant being in default for sixty days, whether the rent has been demanded or not, the lease shall be void, and the term at an end, the consequence of which of course is that the landlord has a right to the possession.

If the case had been otherwise, and the lease had contained nothing dispensing with the necessity of demand, then the landlord would have had to avail himself, if he made no regular demand, of the 263rd clause of the Common Law Procedure Act, in which case he must have satisfied the jury that there was no distress upon the premises ; and considering that the premises in this case were an open field adjoining the highway, the evidence was such as might well have satisfied the jury that there was no distress.

Of the other points raised, we agree in the view taken by the learned judge at the trial.

Rule discharged.

REGINA v. CROZIER.

Criminal Case—New trial—20 Vic., ch. 61.

In a criminal case, the court refused, on motion for a new trial, to receive an affidavit of a witness that he had misapprehended a question put to him.

Defendant was convicted of murder, at Peterborough, before *McLean, J.*

Phillpotts moved for a new trial. He desired the court to receive an affidavit of a witness, that he misapprehended a question put to him, which led to his answer producing a wrong impression.

ROBINSON, C. J., delivered the judgment of the court.

Having read the evidence, though a verdict of manslaughter, we think, would have been one more clearly warranted, yet we cannot say that the conviction for murder was wrong.

It was a case of stabbing in a sudden quarrel. The deceased was unarmed, and the prisoner was most to blame in beginning the quarrel, and pressed upon the deceased, when he might easily have withdrawn from him.

As to the affidavit spoken of, we could not take it as a ground of moving under the statute, for the motion is merely on the evidence, and the act opens no other ground. (a)

Rule refused.

IN RE THE TRUSTEES OF UNION SCHOOL SECTION, No. 15
IN OTONABEE, 10 IN DOURO, 8 IN DUMMER, AND 11 IN
ASPHODEL, AND ROBERT CASEMENT.

Mandamus—Demand and refusal.

Where, on an application for a mandamus, a demand and refusal were sworn to, and defendant, in answer, denied the refusal, and alleged that he had always been willing to do what was required, the court granted the writ.

Eccles, Q. C., obtained a rule *nisi* calling on the defendant to shew cause why a writ of *mandamus* should not issue against him, commanding him that he should, when thereunto requested, suffer the trustees of this school section to inspect and copy the assessment roll for 1858 of the town-

(a) See *Regina v. Beckwith*, 8 C. P. 277.

ship of Douro, so far as the same relates to the east halves of lots Nos. 1, 2, 3, 4 and 5, in the first concession, the same being embraced within the said school section No. 10, and the said Robert Casement being clerk of the municipal council of the said township of Douro; and why he should not pay the costs of this application.

Read shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Upon reading the affidavit of Casement we find that he denies that he ever did refuse to allow a copy of the assessment roll of the township of Douro, so far as relates to the east halves of the lots named, to be taken by the trustees of the said common school section.

It is very distinctly sworn that he did refuse.

The clerk, in his affidavit, not only denies that he has ever refused to do what is now asked, but states facts intended to shew that the union school section, including the half lots referred to, which were long part of school section No. 1 in Douro, has not been legally constituted.

We cannot determine that incidentally. The parties will act at their peril in that respect. But we think we may well grant a *mandamus* to do what the applicants ask for, and what the defendant swears he never refused, and has been always willing to grant.

Rule absolute for *mandamus*.

DENNISON V. HENRY.

Assessment—Liability of trustees and executors.

Where executors and devisees in trust of land were assessed as owners, *Held*, that they were properly so assessed, and that their own goods might be seized for the taxes.

This was an action of replevin brought to recover certain goods of the plaintiff, seized by defendant under a distress warrant for taxes.

A case was stated for the opinion of the court, in which it was admitted,—

1. That the property assessed was devised by the late

George Taylor Dennison to the plaintiff, and Adam Wilson and George P. Ridout, as trustees for certain purposes, they being also executors.

2. That they were assessed in the form mentioned in the extract from the assessment roll, annexed to the special case, *i. e.*, assessed as owners, and described as "Executors to the late G. T. Dennison."

3. That no appeal was made against the assessment.

4. That the property taken for the arrears of taxes was that of the plaintiff, and not of the estate.

Eccles, Q. C., for the plaintiff.

Cameron, Q. C., for defendant.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiff was, with others, assessed for real property in the city of Toronto. They were assessed as owners of the property, and described in the roll as executors of the late George T. Dennison. They were in fact his executors, and devisees in trust of the property, and made no appeal against the rate. It is not stated whether the plaintiff, by himself or tenant, occupied the estate or any part of it.

The question is, whether his own goods could be distrained to pay the tax.

We take this to be unoccupied land assessed to the owners, and although the owners may be trustees only, and have no beneficial interest in the property, yet they are rightly assessed for it.

The 11th and 20th clauses of the 16 Vic., ch. 182, shew that plainly enough, and it is inevitable. Executors and trustees are supposed to have the means of re-imbursing themselves out of the estate; and at any rate the executors in this case were, as trustees, owners of the land, and no other person could be assessed where there were no occupants.

Then we see no authority in the act for holding that an arrear of taxes upon lands held as trustees may not be levied upon the proper goods of the trustees under the 42nd clause of the act. That may no doubt operate hardly, but not more so than the seizure of any other person's goods which

may happen to be in possession of the person assessed, which is expressly authorised by the act. We think a verdict should be entered for defendant.

Judgment for defendant.

HARRIS V. MORDEN.

In an action of dower, where a demand is averred to the declaration, and judgment allowed to go by default, costs may be recovered.

Action for dower.

It was averred in the declaration that the demandant's husband did not die seised ; also, that the demandant averred that one month before action brought she demanded her dower, and that the defendant, notwithstanding, detained it. The demandant, also, in the declaration, claimed damages for the detention of dower, and rents and profits of her third part from the time of the demand served.

Judgment was entered by default. Costs had been taxed to the plaintiff, and a *fi. fa.* issued for them.

Wallbridge, Q. C., for the defendant, moved to set aside the judgment so far as it related to costs, and that the *fi. fa.* should be set aside for irregularity, or be amended by striking out the part which relates to costs, the judgment awarding costs having been entered contrary to law, and without the order of a court or judge.

Dougall shewed cause. *Humphries v. Barnett*, 16 U. C. R. 465 ; *Street v. Rowe*, 8 C. P. 213, were cited.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion this rule should be discharged. The averment of demand of dower being made in the declaration, and no answer having been given to the declaration, and judgment being signed for want of it, we think it would be unreasonable to hold that the demandant is not in as good a situation in regard to the recovery of her costs as she would have been if there had been a suggestion which the tenant had denied, and which had been proved against him, or as if the tenant, either traversing the demand, or pleading a plea in bar and taking no notice of the demand averred,

had had a verdict against him, and the judge at the trial had certified that a demand of dower was proved.

We agree in what was determined by the court of Common Pleas in *Street v. Rowe* on this point, which supports the entry of judgment in this case.

Statutes must be construed with some regard to common sense; and surely it would be idle to get up a trial, in order to prove before a judge what had been averred in the declaration and not denied by the tenant, and equally unreasonable to hold that a fact admitted is not as well established as a fact denied and proved. The statute is incomplete in this particular, and it is desirable it should be amended. We think the rule should be discharged.

Rule discharged.

PERLEY V. LONEY, KIRKLAND, AND MINOR.

Promissory note—One maker surety for others—Time given—Equitable defence.

Action on a promissory note made by three defendants payable to T. or bearer, and by her delivered to plaintiffs. *Plea*, on equitable grounds, by one of the defendants, M., that he made the note as a surety for the others: that after it became due, T., in consideration of a certain sum paid to her, gave time to them without his, M.'s consent; and that the plaintiff took the note after it became due, and with knowledge of the premises. *Held*, good.

ACTION on a promissory note, made by defendants, payable to Elizabeth Tisdale, or bearer, and by her transferred to the plaintiff.

Plea, by defendant Minor, on equitable grounds.—That he made the said note as a surety for the due payment thereof by the said other makers, and not as a principal, of which the said Elizabeth M. Tisdale, and the said plaintiff, had full knowledge and notice before either of them took the said note: that after the said note became due, the said Elizabeth Tisdale being then the holder of the said note it was agreed between her and the said Joseph Loney and Henry Kirkland, the said other makers of the said note, that the said Elizabeth M. Tisdale, in consideration of the sum of £11 5s., then paid to her by the said Joseph Loney and Henry Kirkland, for and as a sum for the forbearance and giving time for the payment of the said

note, and not as a payment on account of said note, should forbear and give time to the said Joseph Loney and Henry Kirkland, the said other makers of the said note, for the period of six months; and the said defendant Minor says, that in pursuance of the said agreement the said Joseph Loney and Henry Kirkland, the other makers of the said note, did pay the said Elizabeth M. Tisdale the said sum of £11 5s., and the said Elizabeth M. Tisdale thereby became bound to give time, and did give time, to the said other makers of the said note, for the period of six months after the said note became due, without the consent of the defendant Minor; and the said plaintiff first took and received the said note after it became due, with full knowledge and notice of the premises, and now sues on the said note for the benefit of the said Elizabeth M. Tisdale; by reason whereof the said defendant Robert C. Minor, as such surety as aforesaid, became and was in equity and good conscience discharged from all liability on the said note.

Demurrer.—That said Minor appearing on the face of said note to be a principal debtor jointly and severally with the other defendants, cannot set up that he was only a surety for the other defendants, or either of them, as against the plaintiff; and there is no averment, nor is it shewn, as said plea should have shewn, that said defendant Minor was accepted by said Elizabeth M. Tisdale or the plaintiff as a surety.

J. Duggan, for the demurrer, cited *Ball v. Gilson et al.*, 7 C. P. 531; *Henderson v. Cotter*, 15 U. C. R. 345; *Nafish v. Soules*, 2 C. P. 412; *Strong v. Foster*, 17 C. B. 201; *Beech v. Ford*, 7 Hare 208.

M. C. Cameron contra, cited *Pooley v. Harradine*, 3 Jur. N. S. 488; S. C. 7 E. & B. 431.

ROBINSON, C. J., delivered the judgment of the court.

We think the current of authorities sustains the defence set up here as one that would be available in a court of equity, though not in a court of law, on account of the rule strictly maintained in courts of law of not allowing a joint maker of a note to aver that he became a party to the note in any

other capacity, or with any more limited liability, than the note would import.

The cases on that point are collected in a note to Pitman's *Treatise on Sureties*, 185.

Courts of law have said that a party who, being in fact a surety, signs a bond or note, or accepts a bill in the ordinary manner, shews by that act that in order to serve his friend he is willing to join him in assuming a direct and primary liability, with all its consequences ; and that the person to whom the note, or bill, or bond is given, although he may know that in fact one of the makers or acceptors was a surety for the other, knows also at the same time that he has executed as a principal, and engaged thereby to stand in the place of a principal party, and therefore the right of the party taking the instrument to treat him as a principal cannot be interfered with.

We do not see why this reasoning, if it be sound, should not have as much weight given to it in a court of equity as in a court of law. But nevertheless, though there is not perhaps an entire concurrence of authority upon this point, even in courts of equity, we think it is established that in those courts a joint maker of a note can be received to prove that he made the note as surety for another party to it, and was not to be primarily liable upon it, as the instrument on the face of it would import ; and that this evidence will be received for the purpose of shewing that by what has subsequently taken place between the principal debtor and the holder, the surety has been discharged.

Now, according to this plea, the present is a case of that kind ; and it is averred in it that this plaintiff, as well as the payee, had knowledge of the fact that the defendant was a surety only, before they respectively took the note.

This seems to leave only the question whether this can be properly set up under the Common Law Procedure Act as an equitable defence. We do not see why it should not be, as it appears that in such a case relief would be afforded in equity by a perpetual injunction against suing at law. *Pooley v. Haradine* (7 E.& Bl. 431), is an authority in favour of this plea, and fully supports it as a good equitable defence. Judgment for defendants on demurrer.

SAMUEL PEW V. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

RICHARD PEW V. " " "

Action for taking gravel—Agreement by B. B. & G. R. W. Co.—How far binding on defendants—Agreement with two—Separate actions by each—Right to plead not guilty by statute.

The first count charged that the defendants wrongfully entered upon the plaintiff's land, and carried away gravel therefrom, then lying lower than two and a half feet above the level of the lake, thereby making the soil rough and uneven, and rendering a large portion of it wet and unfit for cultivation.

The second alleged that the plaintiff was seised for his life of the land, and one R. owned the reversion; and that by an agreement between them and the Buffalo, Brantford, and Goderich Railway Company, they granted to said Company the two first ridges of gravel next the lake; and the Company thereby agreed to leave the ground two and a half feet in depth above the level of the lake, and the surface even and level; that afterwards, and after the passing of the 19 Vic., ch. 21, the said Company, under that act, delivered over their railway to defendants, and defendants completed the same under the agreement set forth in the statute; that defendants chose to enforce the said agreement made with the plaintiffs, and removed the gravel, but dug pits, contrary to the agreement, below the stipulated depth, thereby injuring the land. R. brought a separate action as reversioner for the same injury. Defendant, in each case, pleaded, not guilty, by statute. The agreement, when produced, appeared to be with both plaintiffs jointly.

Held—That the plaintiff could not recover on the first count, for defendants, by the 19 Vic., ch. 21, were entitled to take the gravel, either on making compensation, as pointed out by section 28, or under their agreement; nor under the second count, for defendants were not bound by the agreement; and, besides, it being entered into with the plaintiffs jointly, they could not maintain separate actions.

Robinson, C. J., dissenting as to the second count, and holding that this was not a cause of action to which the defendants were entitled to plead not guilty by statute, and therefore the objection could not be taken.

The declaration charged that the defendants, on the 29th of June, 1856, and on divers days between that time and the commencement of this suit, wrongfully and illegally broke and entered into the plaintiff's close, in the township of Moulton, being lot No. 3 in the front range of that township; and took and carried away earth, sand, and gravel, off the said close, then lying lower than two feet and a half above the level of lake Erie, and near to the lake, and dug pits upon the said close to a depth of six feet below the level of the lake, rendering the soil of plaintiff's said close rough and uneven, and unfit for cultivation; and that by reason of such excavation, and the removal of the sand, gravel, &c., a large portion of the close became wet, and covered with water at all times, so that twenty acres thereof became unfit for cultivation or other use, &c.

There was a second count, setting out that the plaintiff was seized for his life of a certain other close near lake Erie, being lot No. 3 on the lake shore, in the township of Moulton, and that one Richard Pew was seised of the reversion in fee in the said close, expectant on the plaintiff's death, and that, by an agreement under their seals, made between them and the Buffalo, Brantford and Goderich Railway Company on the 22nd of July, 1853, in consideration of £100 they granted and sold to the said last mentioned Company the two front ridges of gravel next the lake in the said lot : that the plaintiff and Richard Pew further agreed with the said last mentioned Company to do certain things set out in the declaration, and that the said Buffalo, Brantford, and Goderich Railway Company thereby agreed with the said Richard Pew and the plaintiff to leave the ground two feet and a half in depth above the level of the lake all over the said ridges, and to leave the surface thereof even and level. The plaintiff then averred that afterwards, and after the passing of the statute 19 Vic., ch. 21, to wit, on the 26th of June, 1856, the Buffalo, Brantford, and Goderich Railway Company, under authority of the said act, delivered over their railway to the defendants, and that the defendants completed the same under the agreement set forth in that statute : that afterwards these defendants thought fit to enforce, and did enforce the said agreement made with the plaintiffs by the former company, and entered upon the said lot, and removed therefrom the said two ridges of gravel, whereby the defendants became liable on the said agreement, to the same extent as the Buffalo, Brantford, and Goderich Railway Company would have been liable if they had been enforcing the same ; and the plaintiff complained that contrary to the terms of the agreement, as before stated, the defendants dug pits below the stipulated depth, thereby letting in the waters of the lake, and committing the injury complained of in the first count.

The defendants pleaded not guilty, by statutes 14 & 15 Vic., ch. 51, secs. 7, 9, 10, 11, 12, 13, 20, 21, and 22 ; 19 Vic., ch. 21, secs. 1 to 43 inclusive.

At the trial, at Cayuga, before *Richards*, J., a verdict was given for the plaintiff for £25.

In another action, tried at the same assizes, Richard Pew, as reversioner, sued the same defendants for the injury done to his interest by the same alleged acts of the defendants.

His declaration contained two counts, similar to those in the action of Samuel Pew, with only the variation occasioned by the nature of the plaintiff's interest in the close.

The defendant pleaded the general issue, as in the other case.

The plaintiff recovered in the latter case a verdict for £12 10s.

The agreement declared on was in the terms set out. It was signed and sealed by Samuel and Richard Pew, and was signed by "John Bannerman, for the Buffalo, Brantford and Goderich Railway Company," with an ordinary wafer seal opposite to his name. It contained no recital of the separate interest or estate of the Messrs. Pew, and it was made with them jointly, as if they had a joint interest in the land.

Freeman, Q. C., in each case obtained a rule *nisi* for a new trial, on the ground of misdirection, in telling the jury that they might find that the acts complained of were done under the agreement given in evidence, and that the said agreement was binding on these defendants, although they had no knowledge of any such agreement; and in not directing the jury that the defendants could not be presumed to have elected to enforce the agreement, unless they knew of its existence; and that the plaintiff's action, if he had any right of action, was barred by the statute, and that his only remedy was by arbitration; and that the agreement being made with the plaintiff and Richard Pew jointly, could not be sued on by the plaintiff alone; and because the verdict was against law and evidence; or why a verdict should not be entered for the defendants on the first count.

Farvis shewed cause, and cited 1 Saund. 153, notes 1, (a), (b); 155 notes 1, (c); *Moison v. The Great Western R. W. Co.*, 14 U. C. R. 102, 109.

Freeman, Q. C., contra, cited *Martini v. Gzowski*, 13 U. C. R. 298 ; *Rutledge v. Woodstock and Lake Erie R. W. & Harbour Co.*, 12 U. C. R. 663 ; *Detlor v. The Grand Trunk R. W. Co.*, 15 U. C. R. 595.

The statutes referred to are cited in the judgments.

ROBINSON, C. J.—*First*, as regards Samuel Pew's case. The first count in his declaration treats the defendants as wrong-doers in having taken gravel and sand from his close on the shore of lake Erie, and thereby let in the waters of the lake upon his land behind the gravel ridge. This is not stated to have been done negligently or unskilfully, or without necessity for making the road, but the mere act of taking the sand and gravel is complained of as wrongful. Now that, as stated in the declaration, was done by defendants after the statute 19 Vic., ch. 21, had been passed; and it must have been so, or it could not have been done by this corporation. Then being so done, it might have been legally done under that act, section 28, on making compensation according to the Railway Clauses Consolidation Act; or it might, though not so clearly, come under the terms of the schedule No. 1, appended to the statute 19 Vic., ch. 21, in which case the defendants would, under that schedule and the enactments of the statute, have had the privilege of obtaining the gravel in question as being given by the agreement, whether they happen to be aware of it or not at the time of their taking the gravel; or what is complained of might have been claimed to be done by the defendants under the third clause of that act, by their electing to avail themselves of the agreement between the old company and the Messrs. Pew, though I think that third clause would scarcely extend to it, because that is confined to lands required by the company, and this was only an agreement for a privilege to be exercised in lands belonging to the Messrs. Pew, and not "land required for the railway," but altogether away from the line.

So that we have here a right in the defendants, under the statute, to take the gravel, &c., independently of any agreement, if they chose to avail themselves of it, but on making

compensation to the owners; and a right, perhaps, according to the Consolidation Clauses Act, to take it under the agreement, though that latter might seem not quite so clear as the former.

Where an act will be legal or illegal, according as it was done upon one footing or another, it shall, till the contrary is shewn, as a general rule to be referred to—that is, supposed to be done with—that view which would make it a legal act; and if the defendants had no right to enter and take the gravel, unless by virtue of the agreement made with the old company, then it might be assumed to have been taken under that agreement; but it is clear that the gravel could be taken legally without the agreement, and indeed much more clearly under the powers of the act than under the agreement with the old company, which agreement the defendants were not at any rate bound to adopt.

It follows, then, that in the absence of evidence to shew that the Company knew of the agreement made with the old Company, and elected to act under it, they could not be held to have taken the gravel otherwise than in the exercise of powers given by the statute under the 28th clause; and at any rate the taking was not tortious, and it follows that if the act is complained of without reference to the agreement, compensation must be sought by arbitration in the manner pointed out in the General Consolidation Clauses Act, 14 & 15 Vic., ch. 51, sec. 11.

The plaintiff therefore in this action could not recover under the first count of his declaration, and a verdict should be entered for defendants upon it, if leave to do so was reserved, which I apprehend was not done.

Then as to the second count, the agreement stated in it not being for “land required by the Company,” does not seem clearly to come within the third clause, and moreover it was not even binding on the old company, being only executed by Bannerman in his own name and with his seal. The duty therefore did not attach upon the defendants to comply with its terms, and yet the count seems to be a count for a wrong done in disregarding a duty which the defendants had undertaken by their contract; and it is

wholly grounded upon the supposed duty of not excavating lower than the depth stated in the agreement with the old company.

The defendants however have pleaded to that count only the general issue of not guilty, under the statutes 14 & 15 Vic. ch. 51, and 19 Vic., ch. 21. But I cannot say there is any thing in those statutes which seems clearly to give the privilege of pleading in this general form, unless where an action is brought for "any damage sustained by reason of the railway," for these are the words of the statute 14 & 14 Vic., ch. 51, sec. 20, which has been made to apply in the case of this railway.

This provision can hardly be applied to actions brought for taking gravel in a manner contrary to a special agreement binding on the defendants.

The defendants ought, I think, to have denied their obligation to confine themselves within the limits mentioned; in other words, they should have traversed their liability to perform the conditions of that agreement.

As the pleadings stand, the defendants admit the agreement, and give no answer further than by denying that they did what is imputed to them, for the plea of not guilty can have no further effect, when it is not rightfully pleaded by virtue of some statute; or the defendants might have demurred to the second count as not shewing an agreement which could be binding on them; but by mistaking, as I think, the effect of the 20th clause of the General Railway Clauses Act, they have left themselves unprotected against the second count for not pleading specially.

The damages are not large, and the merits seem with the plaintiff, for when we consider all the evidence, we cannot doubt that the persons employed by the defendants to take the gravel must have seen very clearly that the old company had, upon some understanding with the owner, taken a great quantity of gravel away before the defendants took up the work; and when we see it proved that the plaintiff remonstrated with them, and objected to their lowering the ridge to any thing less than two feet and a half above the water, that was surely an intimation of some particular terms or

agreement, which, if they did not know it, they ought to have enquired into.

I am not therefore disposed to grant a new trial merely to let in the defendants to amend their pleading to the second count, and it would be probably no favour done to the defendants to take that course.

Upon the plaintiff consenting to allow a verdict to be entered for the defendants upon the first count, I should discharge the rule ; and in the case of Richard Pew against the same defendants, I would make the same order.

These cases are more difficult to deal with as regards the second count, from the uncertainty whether that count should be looked upon as a count in tort, or a count as upon a contract binding on the defendants by virtue of the statute, though not made with themselves. If the latter were meant, it could only, as I have already stated, have been met by a plea suited to the case, and not by the plea of not guilty, by statute.

It does seem in both cases an objection to the action, that one plaintiff in each is suing severally upon an agreement averred in the declaration to have been made by the Company with the persons jointly. If the defendants had pleaded *non est factum* to the count on the agreement, an objection could nevertheless not have been taken by the defendants on the ground of variance, because the declaration sets out the instrument truly, as agreement made with two persons.

The objection that without explanation one of the two could not sue alone upon it might have been taken upon demurrer, or by moving in arrest of judgment ; but neither was done, and I think therefore the verdict which the plaintiffs have obtained may be upheld as regards the second count, upon their consenting to allow a verdict in each action to be entered for the defendants on the first count.

MCLEAN, J.—It is quite clear that no action of trespass can be maintained against the defendants for entering upon any lands and taking gravel therefrom for railway purposes, for

the 28th section of their act of incorporation, 19 Vic., ch. 21, give them express authority, by their agents, servants, and workmen, to enter into and upon any lands of Her Majesty, or of any person or persons, body corporate or politic whatsoever, and to take and hold the same for the purpose of procuring and taking gravel, ballast, and other material required for the constructing, maintaining, or repairing the railway and works thereto belonging, whether such lands be set out on the plans or in the book of reference filed in pursuance of the provisions of the Railway Clauses Consolidation Act or not. The last clause of the section prescribes that compensation shall be made to the owners of land so taken by arbitration, in the manner pointed out in the provisions of the Railway Clauses Consolidation Act relating to lands and their valuation. The verdict should therefore be for defendants on the first count.

Then as to the right of the plaintiffs to recover on their second counts, it appears to me to be equally unfounded. The agreement made with the Buffalo, Brantford, and Goderich Railway Company, a breach of which the defendants are charged in each case with having committed, was not one respecting any land or lands required by that company for the purposes of the said railway, and which the defendants were authorised by the third section of their act to enforce, *if they think fit*, subject to the same extent of liability that the Buffalo, Brantford, and Goderich Railway Company would be subjected to if they were enforcing the same. The agreement is merely for the purchase of two ridges of gravel near the lake shore, and it is expressly stipulated therein that as soon as the gravel is removed quiet possession shall be given to the plaintiff of the premises.

The contract or agreement not being one which the defendants could enforce even if they thought fit, no liability which the former company assumed under it can attach to them, and they cannot be held liable for any breach of its stipulations. But if it were otherwise, the agreement entered into is with the plaintiffs jointly, and they cannot each maintain an action on a joint undertaking. Each is suing in trespass as if each were in possession of the land,

and each is trying to recover for the same identical acts of trespass, and on the same breaches of the agreement, entered into with them jointly by the Buffalo, Brantford, and Goderich Railway Company. In my judgment they cannot maintain their action on either of the counts in their declaration, and the verdicts are on both counts.

On these grounds I think there should be a new trial in each of these cases, without costs.

The plaintiffs might have been nonsuited at the trial, and should now be nonsuited, if leave had been reserved to move for a nonsuit, and such application were now pending.

There is a difficulty in the pleadings, the plea of not guilty not meeting the alleged breach of covenant stated in the second count; but as it is clear to me the plaintiffs have no right to recover, I think a new trial should be granted, and the defendants may then amend this by adding another plea, which no doubt they would have been permitted to add, had any objection been taken at the trial to the admission of evidence under the plea as it now stands.

BURNS, J.—I do not think the plaintiff is entitled to recover in this form of action. The first count is in trespass, and upon that the defendants should have had a verdict, but if that were the only question the judge who tried the cause could enter the verdict on that count for the defendants. It is quite clear that trespass would not lie against the defendants for entering the land and taking away the gravel, for that would be the subject matter of compensation under the provisions of the 28th section of 19 Vic., ch. 21. The plaintiff, with another person, had made an arrangement with the Buffalo, Brantford and Goderich Railway Company, that such company might enter and take away the gravel, and the act done by the defendants was to continue the same, but in doing so the plaintiff complains that the defendants have exceeded the agreement, and taken more than he authorised the former company to take. The defendants, though the agreement was not made with them, cannot be treated as trespassers, for if what they did be treated as an act done irrespective of the agreement,

or beyond the terms of it, supposing it to be binding upon the defendants, the plaintiff's claim shall be prosecuted through the means of an arbitration.

The second count sets forth an agreement entered into with the Buffalo, Brantford and Goderich Railway Company, by the plaintiff and one Richard Pew, stating that the plaintiff had a life interest in the land, and that the other had the reversion, and in consideration of £100 paid to them they sold the gravel ridges to the former railway company: that the defendants accepted the agreement under the act 19 Vic., ch. 21, and so became liable, but in taking away the gravel took more than was agreed upon, and so injured the plaintiff. The count is not framed upon a breach of covenant, for if it were founded upon the agreement, then the objection made by the defendants that one of the covenantees could not sue alone must prevail. The demand made is for the injury done outside and beyond the agreement to the life estate which the plaintiff had in the land. The defendants' plea of not guilty is therefore proper. The effect of this plea, I take it, does admit the inducement set out in the declaration, namely, that the two Pews did enter into an agreement with the Buffalo, Brantford and Goderich Railway Company as stated. The defendants' objection, that the instrument produced cannot be binding upon these defendants, because it is not sealed with their seal, and in fact is not executed by them in any way, would be perfectly good if the plaintiff sought to make the defendants liable by or through the agreement, but, as I have already remarked, the plaintiff concedes the defendants' right to take the gravel under the agreement, and complains that they took more than they had any right to do. If the defendants were liable, as the plaintiff contends, because they have adopted the agreement, and elected to take the gravel, then we must see upon what kind of agreement it is that the statute renders the company liable. The third section of the act makes the defendants liable upon contracts entered into by the Buffalo, Brantford and Goderich Railway Company, whenever the defendants elect to enforce the same. These contracts upon which liability shall exist, I

take it to be clear, are contracts or agreements entered into respecting any land or lands required by the company for the purposes of the railway. In this instance the contract is not for land required, but it is for gravel for the road, and when that should be removed the company were to leave the place level, and two and a-half feet above the water of lake Erie. The 28th section shews that the land required for the road, and the gravel, ballast and materials, were separate and distinct things. The effect of this second count is therefore a demand for an injury committed by the defendants, they the defendants having a lawful right under the agreement with the old company to enter upon the land. The question is, therefore, in truth only presented in another shape, whether the injury is the subject matter of compensation by an arbitration, or whether it can be recovered in an action as the consequences flowing from an entry sanctioned by agreement, but the act done exceeding, as the plaintiff contends, the license given. I do not see that it makes any difference that the entry was under an agreement originally by the old company; the remedy for compensation is still by arbitration, because the entry to take materials would apply quite as much after the defendants had removed what the plaintiffs agree they might, as it would in the first instance. It does not appear to me it makes any difference whether the plaintiff admits the defendants were lawfully upon the land, or that he denies it altogether, so as to alter the remedy given by the statute. The defendants have a right to say, whatever they have done they have done under the statute, and the plaintiff's remedy is also given to him by the statute. The plea is marked as pleaded under the statute, and that course pointed out should be adopted.

Whether the defendants may rely upon the general issue by statute, depends upon the construction to be placed upon the first clause of section 20 of the General Clauses Act. That act is incorporated with the act chartering the defendants' company. The 20th section enacts that in all suits for indemnity for any damage or injury sustained by reason of the railway the defendants may plead the general issue,

and give that act and the special act, and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of the general act and the special act. The question in this case is whether the taking of the gravel half-a-mile off the railway can be said to be done by reason of the railway, so as to come within the general act. The special act may be given in evidence under such a plea as well as the general act. The 28th section of the special act, that is, the defendants' charter, gives authority to the defendants to take gravel, &c., for the construction of the railway, from lands, whether delineated or set out on the plans filed in pursuance of the Railway Clauses Act or not. It appears to me that when taken for the construction of the railway it is quite as much an act done by reason of the railway as if it had been an act done on or by taking the land itself for the railway. The plea of the general issue by statute is, I think, sufficient to put in issue whether the taking of the gravel was for the purpose of constructing the road, and if so, then the defendants' act was done by reason of the railway.

Rule absolute.—*Robinson, C. J.*, dissenting.

MUMA V. HARMER.

Slander—Pleading.

To an action for slander in saying of the plaintiff "I am told that Muma was the man that killed the pedler and I believe it," defendant pleaded that he was told that the plaintiff was the man that killed the pedler and he did believe it. *Held*, insufficient.

ACTION for slander. The words charged in the second count were, "Do you know who killed the pedler. Hurrah for the pedler. You (meaning the plaintiff) was the man that killed the pedler. I am told that you are the man that killed the pedler. I am told that you are the man that killed the pedlar, and I can prove it. I can prove that you was the man that killed the pedler. I am told, Muma, that you are the man that killed the pedler. You killed the pedler and I believe that you did, and if it will be any satisfaction to you I can prove it. You are the man that killed the pedler."

In the third count the words were, "Muma was the man that killed the pedler. I am told that Muma was the man that killed the pedler, and I believe it. I can prove that Muma was the man that killed the pedler. Muma, you are the man that killed the pedler."

Defendant pleaded to so much of the second count as charged the defendant with speaking and publishing the words, "I am told that you are the man that killed the pedler, that he was told that the plaintiff was the man that killed the pedler."

And to so much of the third count as charged the defendant with speaking and publishing the words, "I am told that Muma was the man that killed the pedler and I believe it, that he was told that the plaintiff was the man that killed the pedler and he did believe it."

The plaintiff demurred to each plea, alleging as grounds that it amounted to a plea of not guilty: that the issue intended to be raised was wholly immaterial, and the matters alleged therein could only be referred to, if at all, in mitigation of damages.

D. G. Miller, for the demurrer, cited *Starkie on Libel*, II. 103; *Bennett v. Bennett*, 6 C. & P. 588; *McPherson v. Daniel*, 10 B. & C. 263; *Davis v. Lewis*, 7 T. R. 17.

C. S. Patterson, contra.

ROBINSON, C. J., delivered the judgment of the court.

We think both these pleas are bad, on the authority of *Davis v. Lewis* (7 T. R. 17), and *McPherson v. Daniels* (10 B. & C. 263). All the grounds on which the pleas were held bad in those cases apply equally in this, and there are the additional defects in these pleas, that in the first of them the defendant separates the words which he singles out from other words in the count which give a point and force to them, making them more injurious to the plaintiff's character than if the defendant had said only "I am told that you are the man that killed the pedler." I refer to the words which immediately follow those justified, "and I can prove it."

In the other plea demurred to, the defendant deals more fairly by the declaration, for he does justify the additional

words "*and I believe it;*" that is, he asserts that he believed the slander.

He says, to be sure, in his plea, that "he did believe it," but this is no justification. The defendant was by that assertion adding weight to the slander.

But even without these faults the pleas would be bad, for it has been laid down in several cases, that it is not a justification to plead simply that the defendant was told what he has said he was told, but he must in his plea mention who told him what he ventured to repeat, so as to give a right of action against his informant; and, moreover, it must appear that he spoke the words not maliciously or wantonly, but on some lawful occasion.

Judgment for the plaintiff on demurrer.

REGINA V. OXENTINE.

The court are not authorised to grant a new trial in criminal cases on the discovery of new evidence or for the misconduct of the jury.

The prisoner was convicted at Chatham, before *Burns*, J., of a rape committed upon Isabella Steinhoff, at Raleigh, on the 4th of August, 1858.

McCrea obtained a rule *nisi* for a new trial, on the grounds that the verdict was against law and evidence, and the charge of the judge who tried the case; that the jury were influenced in their verdict by matters not sworn to before them; and on the discovery of fresh evidence.

R. A. Harrison shewed cause, and cited *Bentley v. Fleming*, 1 C. B. 479; *Straker v. Graham*, 7 Dowl. 223; *Harvey v. Hewitt*, 8 Dowl. 598.

ROBINSON, C. J., delivered the judgment of the court.

The statute 20 Vic., ch. 61, allows an application to be made for a new trial upon any point of law or question of fact, in as full and ample a manner as any person may now apply to such superior court for a new trial in a civil action.

We do not think we can, under these provisions, entertain an application on affidavits setting forth the discovery of new evidence or the misconduct of the jury, for these are

not "points at law," which we take it means legal questions that have been or may be raised on the indictment or on the evidence, and they are not questions of fact, which we understand to mean questions of fact arising from or suggested by the evidence given. (a)

The alleged discovery of new evidence refers to the affidavits of witnesses who ought to have been subpœnaed, if the prisoner had reason to suppose that evidence would be material, as they must have known that they would speak to most of the facts they now refer to, because what they do speak of occurred in the prisoner's presence.

One of the witnesses was subpœnaed, as the prisoner's counsel swears, but did not attend because she was ill. The witness herself, however, does not state that she was ill, or what reason she had for not attending, and the other witness is not said to have been subpœnaed, and does not swear whether he was required to attend the trial, or why he did not attend.

What is complained of in the conduct of the jury is, that one of the jurors in the jury room said that the prosecutrix was a person of good character. No testimony as to her character was given at the trial. The evidence of the girl, who was about fifteen years of age, was positive and distinct in proof of the offence, and if believed conclusive.

There was evidence of several witnesses (children) which was calculated to raise great doubt of the truth of the story, but there was some evidence in corroboration of the positive statement, and it was for the jury to determine whether the evidence of the prosecutrix was true or not.

Rule discharged.

REGINA V. TUKE.

Mr. Warren, please let the bearer, William Tuke, have the amount of ten pounds, and you will oblige me—B. B. Mitchell.
Held, an order for the payment of money, not a mere request.

The prisoner was indicted at Whitby, before *McLean, J.*, and found guilty (generally), and was sentenced to four years' imprisonment in the provincial penitentiary, on an indict-

(a) See *Regina v. Crozier*, ante, page 275.

ment charging him with forging a certain order for the payment of money, purporting to be an order from one B. B. Mitchell upon one Mr. Warren, to pay him, the said William Tuke, ten pounds, with intent to defraud, against the statute, &c.

By a second count he was charged with feloniously uttering a certain other forged order for the payment of money, purporting to be, (as in the first count,) well knowing the same to be forged, with intent to defraud, and against the statute, &c.

The writing was as follows :

“Mr. Warren, please let the bearer, William Tuke, have the amount of ten pounds, and you will oblige me.”

(Signed) “B. B. MITCHELL.”

This paper was presented by the prisoner to a son of Mr. Warren's, in his father's shop, who paid the sum mentioned in it. The young man swore that he was in the habit of accepting and paying such orders from customers, but that there was no obligation on him to do so.

B. B. Mitchell, by whom it was purported to be drawn, proved it to be a forgery, and declared that he had never given the prisoner an order on Mr. Warren for money, nor ever authorised him to sign an order in the witness' name. He swore that if the prisoner had asked him for such an order he would probably given him one.

It was proved that the prisoner confessed he had made the writing, and said that he intended to go and settle with Mr. Mitchell, in whose service he was, and then go back and pay Mr. Warren, before it was known what he had done.

It was objected at the time of the trial that the instrument alleged to be forged was only a request to pay money, not an order.

The learned judge ruled that it was an order, and passed sentence on the prisoner ; and reserved the legal question for further consideration by the court.

R. A. Harrison for the crown, cited *Arch. Crim. Plg.* 13th Ed., 482-4; *Russ. C. & M. II.*, 511, *Chitty's Statutes*, 2nd Ed., 229 note *d*; 18 Vic., ch. 92, sec. 7.

M. C. Cameron, contra, cited *Rex v. Baker*, 2 Moo. C. C. 210; Arch. Crim. Plg. 484.

ROBINSON, C. J., delivered judgment of the court.

The statute 10 & 11 Vic., ch. 9, sec. 3, makes it felony to forge or utter any undertaking, warrant, or order for the payment of money, with intent to defraud. It does not make it felony to forge a request to pay money, and the prisoner is not indicted for forging a request, neither is he indicted for forging a warrant to pay money, which is one of the instruments mentioned in our statute, and if he had been so charged he could not in our opinion have been properly convicted of forging a warrant, because the writing cannot be properly so called.

The only question is, whether the writing is or is not an order for the payment of money, for it is called by that name and no other, in the indictment.

We think the writing is an "order." It is true it contains the words "please let," &c., and "you will oblige me," from which it is argued that it is a mere request, and no order; but the insertion of these words of courtesy, which are frequently used when the person drawing the order has no doubt of its being paid, does not make it less an order. Nor is it, we think, important that the words "let the bearer have," are used, instead of the words, pay the bearer.

The only question that can raise a doubt seems to be, whether the writing is exclusively a request, and not an order, inasmuch as it appears that Mitchell had no right to order Mr. Warren to pay the money. There are several late cases in which the same writing has been ruled to be both an order and warrant, and any order is a request, so that holding the writing to be the one does not necessarily imply that it is not also the other.

If a person having an account with a bank, which he knows to be at the time overdrawn, were to give a check for a small sum, he would not have in fact a legal right to draw such check, and he would know that he had not, and might perhaps, in consequence of that, if it occurred to him, add the words "please," or "you will oblige," but his check would be no less an order. We cannot, on any reasonable

ground, draw a distinction between such a case and that of a merchant's customer sending an order for a small sum of money, when he knows he has no right to send for any thing but goods.

It has been held lately in England that the true criterion is whether, if the instrument were genuine, and the person to whom it was directed paid it, he could recover the amount. Now this instrument was in fact tendered as an order, and paid accordingly, and no doubt, if it had been genuine, Mr. Mitchell could have been sued by Warren for money paid by his order. We therefore think the conviction was legal.—We refer to *Regina v. Carter*, (1 Cox C. C. 172); *Regina v. Ferguson*, (Ib. 241), *Regina v. Dawson*, (3 Cox, C. C. 220); 2 East. P. C., 940; *Regina v. Vivian*, 1 Dem. C. C. 35.

There have been, no doubt, many decisions which are inconsistent with these, and which must be considered as having been over-ruled by them.

Conviction affirmed.

MCDONALD v. MCPHAIL.

Will—Construction of—Boundary.

A. devised to defendant "that 100 acres which he now occupies, being No. 26 only, and that he is not to occupy or use that part or strip of said lot on the east side of the stone fence which is now a divisional line between his farm and mine, and that that stone fence is to be considered a boundary line, and to be continued all through between the two farms." The stone fence, it appeared, if continued, would cross the division line between 25 and 26, and cut off a triangular piece of 25 at the north west corner of that lot. *Held* that defendant was entitled to that piece, being on the west side of the stone fence, although not part of lot 26.

EJECTMENT for the west half of the west half of lot number twenty-five in the fourth concession of the sixth range of the township of Cornwall.

The defendant defended for the whole, stating in his notice that he "denied the title of the plaintiff to the premises in question as part of No. 26, in the fourth concession of the township of Cornwall, and claims the same as having been devised to him by the last will and testament of Archibald McPhail, being the triangular piece of land bounded on the east by a line in continuation of the stone wall mentioned

in the will, and on the west by the side line between lots 25 and 26, and on the north by the river Aux Raisins."

At the trial, at Cornwall, before *Richards, J.*, a verdict was taken for the plaintiff, subject to the opinion of the court.

It was admitted that the testator owned both of the lots 25 and 26. The plaintiff claimed as mortgagee of Catherine McPhail, devisee of an estate for life under the will, in 100 acres of lot 25. The devise to the defendant upon which the dispute turned was as follows: "I give and bequeath to James, my son, that hundred acres which he now occupies, being number twenty six only, and that he is not to occupy or use that part or strip of the said lot on the east side of the stone fence which is now a divisional line between his farm and mine, and that that stone fence is to be considered a boundary line, and to be continued all through between the two farms."

This stone fence, it appeared, did not form the true boundary between lots 25 and 26, and was incomplete at the time of the testator's death. It began on lot 26, about half way between the north and south limits, and to the westward of the side line between it and lot 25, the lots numbering from the east. Being continued in a northerly direction towards the river it would cross the division line, and cut off a corner of lot 25, thus leaving the triangular piece at the north west angle of that lot, which the defendant claimed under the terms of the will, though admitting that it formed no part of lot 26. By continuing the fence southward, a similar piece would also be taken from lot 26, and left on the east side of the wall.

J. S. Macdonald, Q. C., for the plaintiff.

McBride for defendant.

ROBINSON, C. J., delivered the judgment of the court.

The testator owned both 25 and 26, and could divide them among the members of his family as he thought proper, with or without regard to the division line between those lots, and treating it all as one property that he could parcel out as he liked. We might suppose, at first, that he

meant not to devise anything to the defendant James which did not form part of 26, and that the direction that he is not to occupy "east of the stone fence," should be taken to mean that if the stone fence should be found to take in a part of 26, instead of being in the line between 25 and 26, still James was to have no land east of it.

But we cannot adhere to that construction, we think, when we read the whole of the devise, for we find that the testator speaks in it of James's farm and his, which might fairly be taken to mean the parts of his own property (400 acres) which they were respectively occupying when he made his will; and he evidently intended that they should go to his several devisees as distinct properties, according to that designation of them, namely, as his farm and James' according to their occupation, with this only stipulation, that (without reference to the proper division line between 25 and 26) the stone fence was to be the boundary between the two farms. And as the stone fence he referred to went only part of the way from the centre of the lot, towards the front on the river Raisin, the testator distinctly directs by his will that it is to be continued all through between the two farms.

The stone fence beginning near the centre of the lot, and running northerly towards the river, does not run on a course parallel with the side lines of the lot, but happens to tend considerably to the eastward, so that, although it begins upon lot 26, and considerably to the westward of the division line between it and 25, which is east of it, yet it crosses the division line, and cuts off a large corner of 25, before it reaches the river Raisin, forming a triangular piece of ground west of the wall and on lot 25, which piece so cut off is the subject of this action.

It is probable the testator was not aware that the stone wall was so much out of the course of the side lines of the lots, but we cannot say whether he was or not, and if he was he might still have given the direction that he did, because the lot 25 would gain by the deviation of the line of the stone wall from this side line as large as a piece on the south end as it would lose on the north.

But however that may be, the will is plain on that point, first shewing an intention to give to Catherine 100 acres of 25 only, but afterwards explaining his actual meaning to be to give to her what he had called already his own farm, and to the defendant James what he called his farm; and not leaving us to conclude that the true line between the two lots was to be the boundary between the two farms, he expressly, by the words last used, which must prevail, directs that his son James is not to go east of the stone fence, "which is to be considered a boundary line," and to be continued all through between the two farms. It is possible he may have meant by that, rather that there should be a stone fence made between the two properties throughout, and not upon a wrong course, if the part that had been built was on a wrong course, but upon a course from each end of it corresponding with the side line.

We think, however, the language of the will is too plain to admit of our putting that construction upon it, and the boundary between the two properties must be found by producing the stone wall both ways, without regard to its interference with the side line of the lots either to the east or west. We think that Catherine took under the will whatever portion of 25 and 26 ranges east of the line of stone fence when produced both ways, and James whatever ranges on the west of it.

Judgment for the defendant.

ARTHUR V. CLOUGH ET AL.

Assignment of debts—Attachment—Pleading.

To an action on the common counts defendants pleaded that before this suit the plaintiff assigned the claim to one G.: that one H. recovered judgment against G. for an amount exceeding this debt, and obtained an order to attach all debts owing by defendants to G. to answer said judgment, and this debt then became bound in defendants' hands to answer the Judgment. *Held*, bad, the debt not being one which could be attached as by law due to G.

ACTION on the common counts against the defendants as executors of F. McIntosh, for money payable by the testator to the plaintiff, goods sold and delivered by the plaintiff to

him, &c., and for money payable by defendants as executors to the plaintiff for money paid by the plaintiff to their use as executors as aforesaid, &c.

Third plea, that before the commencement of this suit the plaintiff assigned the causes of action in the declaration mentioned to one Henry Greenshields, whereby the defendants as executors as aforesaid, became liable to pay the same to the said Henry Greenshields; and the defendants as executors as aforesaid, further say, that before the commencement of this suit one William Hobbs recovered a judgment of this honourable court against the said Henry Greenshields for an amount exceeding the amount so due by the defendants as executors as aforesaid, by reason of the said causes of action in the declaration mentioned. And the defendants, as executors as aforesaid, further say, that after the commencement of this suit, and while they were so liable to pay the said Henry Greenshields, the said William Hobbs, according to the statute in that behalf, obtained an order of this honourable court to attach all debts due and owing or accruing due from the said defendants, as executors as aforesaid, to the said Henry Greenshields, to answer the judgment recovered by the said William Hobbs against the said Henry Greenshields, and which said debt so due by the defendants, as executors as aforesaid, to the said Henry Greenshields, is now attached and bound in their hands to answer the amount of the said judgment so recovered by the said William Hobbs against the said Henry Greenshields.

The plaintiff demurred to this plea, on the grounds—1. That the said causes of action are not assignable at law. 2. That said causes of action are not a debt owing or accruing due from said defendants to Henry Greenshields. 3. That by said plea it is shewn that the said defendants are not persons indebted to the said judgment debtor, but only to the plaintiff in this suit. 4. That the word *accruing* is only applied to a *debitum in presenti solvendum in futuro*. 5. That said causes of action are not a debt, are not liquidated, and do not become a debt until after judgment. 6. That said assignment of said causes of action does not constitute a debt owing or accruing due from the defendants

to said Henry Greenshields, within the meaning of the garnishee sections of the Common Law Procedure Act, 1856.

Dougall, for the demurrer. *Bell*, contra. The following authorities were cited : *Turner v. Jones*, 26 L. J. Ex. 55 ; *Addison on Contracts*, 75 ; *Dingley v. Robinson*, 26 L. J. Ex. 262 ; *Campbell v. Peden et al.*, U. C. L. J. 1857, page 68.

ROBINSON, C. J., delivered the judgment of the court.

The executors do not deny, in their third plea, that, as executors of McIntosh, they are indebted to the plaintiff ; but they say that the plaintiff has assigned the debt to Greenshields, and that one Hobbs, having recovered a judgment against Greenshields, has obtained an order to attach all debts due from the defendants, as executors as aforesaid, to Greenshields, in order to satisfy his judgment, and that this debt has been attached.

Under the circumstances stated, the debt could not have been attached by a judgment creditor of Arthur, after he had made it over *bona fide* for good consideration to Greenshields ; because, though choses in action cannot in the view of a court of law be assigned, yet we should look upon Greenshields as the equitable owner of the debt, and would not order it to be applied in paying a debt due by Arthur after he had assigned it, but it does not therefore follow that the debt can be attached by Hobbs as judgment creditor of Greenshields, as if it were a debt due by law to Greenshields by virtue of the assignment, which it clearly is not.

Judgment for the plaintiff.

THOMPSON V. McDONALD.

Promissory note—Giving time to surety—Equitable defence.

Action of a promissory note made by defendant payable to W. or bearer, and by him delivered to plaintiff. *Plea*, on equitable grounds, that the note was made by defendant as surety, jointly and severally with one C., to secure a debt due from C. to W., as W. well knew : that W. transferred to the plaintiff, after it became due, and without consideration ; and that W. after it fell due and before the transfer, and the plaintiff after such transfer, without defendant's consent, gave time to C. to the prejudice of defendant. *Held*, no defence.

ACTION, on a promissory note made by defendant payable

to one James Ward or bearer, and by him transferred to the plaintiff.

Plea, on equitable grounds, that the said note was made by defendant jointly and severally with one C., to secure a debt due from the said C. to the said James Ward ; and that the said James Ward, at the time he received the said note so made as aforesaid, well knew that the defendant received no value or consideration therefor, and that the same was made by the defendant as security for the said C., and that the said James Ward transferred and delivered the said note to the plaintiff after the same became due and payable, without any consideration or value given by him for such transfer and delivery thereof ; and that the said James Ward, after the said note became due and payable, and before the transfer and delivery thereof to the plaintiff, and the plaintiff after such transfer and delivery, without the consent or knowledge of the defendant, gave the said C. time for the payment of the said note, and hath forborne for a long period of time to enforce payment of the said note, to the prejudice of the defendant.

Demurrer.—That the plea does not deny that the said James Ward gave consideration for the said note, nor shew any want of consideration for the making of the note, but, on the contrary, does shew consideration : that it does not appear by the said plea but that the said James Ward received consideration for the transfer of said note ; and that it does not appear by the said plea that there was any binding contract to give time to either of the said makers, or that there was any consideration for such forbearance.

McMichael for the demurrer. *Hector Cameron*, contra. *Perley v. Loney*, ante, page 279, was referred to

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this plea is insufficient. It states only that the holder of the note has given time to the principal debtor, not that he has by any agreement bound himself to do so. What is set up is a mere forbearance or indulgence shewn to the principal debtor, and this alone has never been held to discharge the surety.

It is unnecessary therefore to consider the sufficiency of the plea in other respects as an equitable defence.

Judgment for plaintiff on demurrer.

SCOTT V. KELLY.

Contract—Assignment—Payment by mistake—Money had and received—Trover.

M. had a contract to supply wood to a railway company, for which he was to be paid when it had been inspected and accepted. While 152 cords were lying in the company's yard for inspection, he assigned all the wood that belonged to him, with other property, to the plaintiff, for the benefit of his creditors. He at the same time made over his interest in the contract to defendant, who completed it, and the company afterwards by mistake paid defendant for these 152 cords, as well as for what he had himself supplied.

Held, that the plaintiff might recover this sum as money had and received, but that he could not maintain trover, there having been no conversion by defendant.

Held, also, that defendant could not object that the assignment to the plaintiff was not properly filed.

DECLARATION. First count, for money payable by defendant to plaintiff for goods bargained and sold, for money received by defendant for the use of the plaintiff, and for money found to be due from defendant to plaintiff on an account stated. Second count, in trover, for 152 cords of wood.

Pleas. 1. To first count, never indebted. 2. To the second count, not guilty. 3, and 4, to the second count, the wood not the plaintiff's property, and that the plaintiff was not lawfully possessed.

At the trial, at Sarnia, before *Burns, J.*, the facts appeared as follow: A person of the name of Minty had a large contract with the Great Western Railway Company for supplying them with wood. He had got out and delivered 952 cords, of which 800 cords had been accepted and paid for. The remainder, 152 cords, on the 4th of May, 1858, had been delivered at the station, but had not yet been measured, inspected, or accepted by the company. It was proved by Minty that after the wood was once delivered by him on the premises of the company he could not remove it without permission from the company, but that the delivery to the company was not complete until the wood had passed inspection, and was measured by their

agent, according to the specification in the contract with the company. While these 152 cords remained still not inspected or measured, and as yet unaccepted by the company, Minty made an assignment of his property to the plaintiff for the benefit of creditors, and in that assignment included these 152 cords of wood. The assignment was executed on the 4th of May, 1858, and filed in the county clerk's office on the same day. No affidavit was made by the bargainee therein mentioned. Minty was indebted to the defendant, and for his benefit at the same time assigned to him the contract with the company, in order that he, the defendant, might fulfil the residue of it. The defendant did complete the contract, and delivered 390 cords, and received payment for that quantity. The company, subsequent to the assignment of the 152 cords to the plaintiff, accepted the wood, and in July after, when they accepted the 390 cords from the defendant, not knowing of or overlooking the fact of a portion of the wood being assigned to the plaintiff distinct from the assignment of the contract, paid for the whole quantity to the defendant. The defendant admitted he had received payment from the company for these 152 cords, and that it was an error on the part of the company, but said that as he had received the money he should keep it, as he was a creditor of Minty's.

The defendant's counsel, at the trial, made the following objections to the plaintiff's recovery, either in assumpsit for money had and received or upon the count in trover. 1. That upon the count in trover there was no taking of the wood by defendant proved, and therefore that count could not be sustained. 2. That upon the count in assumpsit there was no privity between the plaintiff and the defendant established. 3. That the amount due from the company for the wood might be looked upon as a debt due, and then it could not be assigned so as to give the plaintiff a right to maintain a suit in his name. 4. That the assignment to the plaintiff not having an affidavit of the bargainee attached, was not in accordance with the statute.

The learned judge overruled the objections, holding that the facts entitled the plaintiff to recover either upon the

count in trover or in assumpsit, and that the facts taken separately might perhaps support either view. The plaintiff might take an assignment from Minty of his title in the wood, subject to the right of the Great Western Railway Company to accept or reject it, and if the defendant afterwards pretended to the company that these 152 cords of wood were his, and he sold it as such, trover might have been maintained against him, upon the inference that such conduct amounted to a taking on his part; or if the defendant merely received payment for it in error on the part of the company, without his contributing to that error, then the money received by the defendant was so much money belonging to the plaintiff in the defendant's hands. As to the objection that the bill of sale did not contain an affidavit of the bargainee, the judge held that the defendant was not in a situation to raise such an objection to prevent the money from being recovered from him.

The jury gave a verdict for the plaintiff, £96 15s., and leave was reserved to the defendant to move the court to enter a nonsuit, if the court should think the objections ought to prevail.

Davis obtained a rule *nisi* accordingly, or for a new trial. *Prince* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The objection to the count in trover I take to be correct; there was no conversion of the wood by the defendant. But for the money had and received by the defendant, I think the plaintiff was clearly entitled to recover.

The defendant was proved to have admitted that he had received from the company more money than he had any claim to for the wood which he himself had delivered, and that he supposed the company had made a mistake in paying it to him. He offered to give up half of the money to the plaintiff, and only gave as a reason for keeping any portion of it, that he was himself a creditor of Minty's.

As to the objection taken to the written assignment under which the plaintiff claims—namely, that it had not been duly filed according to the Chattel Mortgage Act, for want of a

proper affidavit made by the assignee—nothing can turn upon that, because the provisions of that act can only create difficulty where the assignment is disputed by a person claiming under a subsequent assignment, or by a judgment creditor of the party making it.

As to the plaintiff's right to the money, the wood must have belonged in the eye of the law to Minty until the property in it had vested in the company as vendees, which it could not do until it was inspected and measured. It was in the meantime so far under the control of the company, that they could and probably would have prevented its being taken out of the yard, and would have kept it till they had examined and measured it, rejecting any that did not come up to the contract; yet the wood must in the meantime have belonged to some one, and as it was not yet the wood of the company, it must have been the property of Minty who took it there, and who could assign it subject to the company's claim. About the company's claim to the wood there can be no difficulty, because they have got the wood and have paid for it. Minty makes no claim to the money which has thus got by mistake into the wrong person's hands, and he admits that the plaintiff is the person entitled to it, and supports his claim by his evidence.

We think the plaintiff was properly allowed to recover, and that this rule must be discharged.

Rule discharged.

MCDONELL V. SMITH.

20 Vic., ch. 22—Change of office—Re-election.

Defendant, while a member of parliament, was appointed to the office of Postmaster-General, and again re-elected for the same constituency. On the 29th of July he resigned that office, and within a month, viz., on the 6th of August, was appointed President of the Council, which office he resigned on the same day, and on the next day he was re-appointed to his old office of Postmaster-General. *Held*, that he was authorised by the 22 Vic., in taking this course, and not subject to any penalty.

The penalties imposed by that act apply to members of the assembly retaining their seats without re-election after acceptance of office, and not only to persons absolutely ineligible.

The exemption contained in the seventh clause is not confined to one resignation and acceptance of office, but allows the change to be repeated, and the person may thus go back to the same office which he first resigned.

It was stated in the pleadings that the ministry, of which defendant as Postmaster-General was a member, all resigned office on the 29th of July, and on the 2nd of August were succeeded by the opposition, who resigned on the following day: that on the 6th the old ministry were re-appointed, but took different offices from those which they before held, and on the 7th resigned again and were re-appointed to their old places: and it was alleged that the appointment to a different office in the first instance was colourable, and made only to enable defendant to resume his original appointment without going back for re-election.

Held, that although such a proceeding was probably not contemplated by the act, it was allowed by it: that the court could not look at defendant's motives, or strain the construction of the statute so as to impose a penalty; and that whether the course taken was or was not consistent with the system of political government established in this province, was a question which they could not take into consideration.

The plaintiff sued as common informer, upon the statute 20 Vic., ch. 22, to recover penalties for which he alleged the defendant was liable under that statute for having sat and voted in the Legislative Assembly while he was disqualified.

The pleadings were in all material respects the same as in the case of *McDonell v. Macdonald*, in the Common Pleas (8 C. P. 479), where they are stated; and as they are very long, and the judgment is not given upon them particularly, it is considered unnecessary to set them out here. The facts of the case are fully stated in the judgments.

Adam Wilson, Q. C., and *C. S. Patterson*, for the plaintiff, cited *Heydon's Case*, 3 Rep. 7; *Guthrie v. Fisk*, 3 B. & C. 178; *Hughes v. Stratham*, 4 B. & C. 187; *Le Feuvre v. Lankester*, 3 E. & Bl. 544; *Swift v. Swift*, 3 Knapp, P. C.C. 303; *Bowger on Public Law* I. 169; *Collins v. Blantern*, Sm. Lea. Cas. 263; *Duchess of Kingston's case*,

3 Rep. '88; Lord Howden v. Simpson, 10 A. & E. 783; S. C. 9 Cl. & Fin. 66; Warner v. Armstrong, 3 M. & K. 45; Doe Mitchinson v. Carter, 8 T. R. 57, 300; Staines v. Wainwright, 6 Bing. N. C. 174; Law v. Law, Cas. Temp. Talb. 140; Regina v. Buchanan, 8 Q. B. 883; Rex v. Edwards, 6 C. & P. 515; Regina v. Goodchild, 2 C. & K. 293; Fletcher v. Lord Sondes, 3 Bing. 501; Pierce v. Hopper, Str. 253, 258; Bac. Abr. "Statute" I; Ib. "Offices" A.

Cameron, Q. C., and Eccles, Q. C., contra.

ROBINSON, C. J.—The third section of the act provides, that "except as hereinafter specially provided, no person accepting or holding any office, commission or employment, permanent or temporary, at the nomination of the Crown in this province, to which an annual salary, or any fee, allowance or emolument, or profit of any kind or amount whatever from the Crown is attached, shall be eligible as a member of the Legislative Council or of the Legislative Assembly, nor shall he sit or vote in the Legislative Assembly or in the Legislative Council as an elected member thereof, during the time he holds such office, occupation or employment. Provided, first, that nothing in this section shall render ineligible, as aforesaid, any person who shall be a member of the Executive Council of this province, or who shall hold any of the following offices, that is to say, of Receiver-General, Inspector-General, Secretary of the Province, Commissioner of Crown Lands, Attorney-General, Solicitor-General, Commissioner of Public Works, President of Committees of the Executive Council, Minister of Agriculture or Postmaster-General, or disqualify him to sit or vote in either house, provided he be elected while holding such office, and be not otherwise disqualified."

By the fifth section it is enacted as follows, "If any person hereby disqualified or declared incapable of being elected a member of the Legislative Council or of the Legislative Assembly, shall nevertheless be elected and returned as a member of either house, either in the present or any future parliament, his election and return shall be null and void: and if any person hereby disqualified, or declared

incapable of sitting or voting in the Legislative Council or in the Legislative Assembly shall presume to sit or vote therein, either during the present or any future parliament, he shall thereby forfeit the sum of five hundred pounds currency for each and every day on which he shall have so sat or voted; and such sum may be recovered from him by any person who shall sue for the same by action of debt, bill, plaint or information in any court of competent civil jurisdiction in this province."

The sixth section enacts, that "if any member of the Legislative Assembly or any elected member of the Legislative Council shall, by accepting any office, or becoming a party to any contract or agreement, be disqualified under the foregoing provisions to continue to sit or vote in the said Legislative Assembly or Council, his election shall thereby become void, and the seat of such member shall be vacated, and a writ shall forthwith issue for a new election as if he were naturally dead; but he may be re-elected as a member of either house if he be eligible under the first proviso to section three of this act.

The seventh section, which follows, and on which the question mainly turns, is in these words:

"Provided always, that whenever any person holding the office of Receiver-General, Inspector-General, Secretary of the Province, Commissioner of Crown Lands, Attorney-General, Solicitor-General, Commissioner of Public Works, Speaker of the Legislative Council, President of Committees of the Executive Council, Minister of Agriculture, or Postmaster-general, and being at the same time a member of the Legislative Assembly, or an elected member of the Legislative Council, *shall resign his office, and within one month after his resignation accept any other of the said offices, he shall not thereby vacate his seat in the said Assembly or Council.*"

The 12th, 13th and 14th sections of the act relate to the steps that are to be taken for supplying vacancies created by the acceptance of office, but they seem not to have any material bearing upon the questions before us.

The following are the facts upon which the plaintiff founds his claim to the penalty:

The defendant, Mr. Smith, was elected a member of the Legislative Assembly, to serve in the sixth parliament of Canada, holding no office at the time which could render him ineligible.

Afterwards, and while he continued to be a member of the Assembly, he was appointed by the Crown to the office of Postmaster-general, one of the offices mentioned in the third clause of the statute 20 Vic., ch. 22.

The acceptance of that office having the effect of vacating his seat in the Assembly, a new election took place under the sixth clause of the statute, and while he continued to hold the office of Postmaster-general he was again chosen to represent the same county for which he had before served.

On the 29th of July, 1858, if the dates are accurately given in the pleadings, he resigned that office of Postmaster-general, and within a month of such resignation, namely, on the 6th of August following, he was appointed president of the Executive Council, or what the statute calls president of committees of the Executive Council, which office he resigned on the same day, and on the next day (7th of August) was made Postmaster-general, that office being the same which he had resigned on the 6th of August.

This is a statement of the facts merely as they regard the defendant's resignation and acceptance of office, without referring at present to any of those circumstances which the plaintiff has stated in his seventh and eighth counts, and in his replications to the defendant's 1st, 3rd, 4th, 6th and 7th pleas. And taking the case in the first place in its simplest form, and supposing the plaintiff's case not to be aided by any of those special circumstances connected with the defendant's acceptance of office, on which the plaintiff relies, the plaintiff has contended that even so the defendant is liable to the penalty upon the fair legal construction of the statute.

The defendant, on the other hand, insists that he is not so liable, for that,

1st. The legislature of Canada had not the power, as he contends, to impose any disqualifications upon members of the Assembly, or upon persons desiring to be elected as

members, in addition to the disqualifications which are imposed by the act for the union of the two provinces, 3 & 4 Vic., ch. 35, and so that the statute 20 Vic., ch. 22, was in that respect unconstitutional and void.

2ndly. That if they had authority to pass that statute, and in the manner in which they did pass it, that is, without reserving it for the consideration of Her Majesty, still the statute does not in its terms impose any penalty for doing what the defendant is charged with having done ; that is, for sitting or voting in the Assembly after his seat had been vacated by the acceptance of office subsequent to his election.

3rdly. That if it be true that a penalty has been legally imposed for sitting or voting in the Assembly under such circumstances, still this defendant has not incurred the penalty, for that by reason of the provision contained in the 7th clause of the act he did not vacate his seat by his acceptance of office on the 7th of August as Postmaster-general.

Upon the first question : namely, whether the colonial legislature had power to impose such disqualifications as they did impose in regard to sitting or voting in the Assembly, and that without the act being reserved for the signification of Her Majesty's assent, we have none of us any doubt.

Under the British statute, 31 Geo. III., ch. 31, which gave to Upper and Lower Canada their first representative constitution, the power of adding disqualifications to those which that statute had specified was given to the legislature of each province, by the 23rd section, in terms too plain to admit of question. I speak now with reference to the Assembly in each province. And it was not made necessary by that act that any bill passed for such a purpose by the two houses in either province should be reserved for His Majesty's consideration, though by the 30th clause of the act of authority given to the Governor to give or withhold the royal assent of bills, or to reserve them for His Majesty's pleasure, was made subject (but not more in regard to bills for this purpose than to others) to such instructions as

the Governor might from time to time receive from Her Majesty. In fact, additional disqualifications were imposed in Upper Canada by statute, of which the 4 Geo. IV., ch. 3, and 7 Wm. IV., ch. 114, are instances, one of which acts appears to have been reserved for the signification of His Majesty's pleasure, and the other not.

I refer to the state of things which prevailed under the 31 Geo. III., ch. 31, in respect to this matter, not because it bears directly on the question at the present time, but because it must seem unlikely that the imperial parliament, when they united the provinces of Canada, would intend to confine the power of the united legislature within narrower limits in this respect, than they had allowed at so early a day to the legislature of each province.

They have not so confined them, I think, for the 27th clause of the Act of Union, 3 & 4 Vic., ch. 35, enacts that *until provisions shall otherwise be made* by the legislature of Canada, the laws which were then in force regarding the vacating the seats of members shall continue to be in force in each section of Canada respectively. It would be too narrow a construction to give to the words "*until provisions shall otherwise be made,*" to take them to mean only that the existing laws should continue to be in force till the united legislature should provide for abrogating them or some of them. They must be understood, I think, to mean till the united legislature should make other provisions regarding the vacating the seats of members; that is, any such provisions as they may think proper.

This statute does concede to the legislature of Canada a general authority to make laws respecting the disqualification of persons to be elected to, or sit or vote in the Assembly; that is, any laws not repugnant to this or to other imperial acts. I concede, therefore, that it was competent to the legislature of Canada to pass the statute 20 Vic., ch. 22, respecting persons being disqualified by office from being elected to or sitting or voting in the Assembly, and to pass it in the manner in which they did pass it: that is, without its being specially reserved for the signification of Her Majesty's pleasure.

The Act of Union does not, any more than the 31 Geo. III., ch. 31, did, direct that bills of this nature shall be so reserved, before they receive the royal assent. It does contain the same provision (sec 59) as the former constitutional act making all the powers to be exercised by the Governor subject to such royal instructions as he shall receive from time to time, but we have no intimation nor any judicial knowledge of the existence of any royal instructions on this point, and need not therefore consider what would be the effect of the Governor giving the royal assent at once in the colony to any act of this nature, contrary to a royal instruction enjoining him to reserve it.

Upon the second question, whether the penalty imposed by the colonial statute 20 Vic., ch. 22, does or does not attach upon members of the Assembly not holding any such office as would make them ineligible, but accepting any office after their election which disqualifies them from sitting or voting in violation of the act, my opinion is that it does.

While the statutes 7 Vic., ch. 65, and 18 Vic., ch. 86, were in force (one of which statutes, by the way, was specially reserved for the consideration of Her Majesty before it was assented to, and the other was not), no person holding any of the offices referred to in the pleadings in this action could have incurred a penalty by sitting or voting after he had been disqualified by accepting office, as will be quite plain to any one examining their provisions; for the former act, which imposed the penalty, imposed it only upon persons disqualified by that act from being elected, and the provincial officers in question were not made incapable by that act from being elected, or of sitting and voting. And the latter act, 18 Vic., ch. 86. says nothing about penalties, neither did the statute 16 Vic., ch. 154, which it repeals.

The only statute which we have now to look to on this point, 20 Vic., ch. 22, does impose penalties, and does, I think, very clearly impose them upon persons who, not holding any office which would make them ineligible, shall accept any office after the election which disqualifies them from sitting or voting, and who shall nevertheless sit or vote. It is impossible to deny that the third section of this

act does disqualify such officers as I am now referring to from sitting or voting in the Assembly unless they have been elected while holding the office. And it is equally clear that the fifth section of the act does impose the penalty upon all persons who, being disqualified from sitting or voting in the Assembly, shall nevertheless presume to sit or vote therein.

If, then, the penalty does *prima facie* attach in such cases, the next question is, how does the seventh clause apply under the circumstances of the case before us, leaving still for the present out of view all the special circumstances under which the defendant's office of Postmaster-general was resigned and again accepted by the defendant, as well as the circumstances that intervened.

Did he vacate his seat by accepting the office of President of the Council?

I think certainly not; and it is not indeed contended that he could be held to have done so, except for certain special circumstances connected with the resignation and acceptances which I am not at present considering. By resigning one of the enumerated offices and accepting another within a month, he did only what the seventh clause expressly allows to be done without vacating his seat in the Assembly.

Then, next, admitting only for the moment that the defendant was rightly maintaining his seat in the Assembly while he held the office of President of the Council, would the seventh section have saved him from the necessity of re-election in case he had afterwards resigned that office also, and had accepted the office of Secretary of the Province, or any other of the offices mentioned in section three, except the office of Postmaster-general, or could he have gone the round of those offices, removing, with the sanction of the Crown, and by its appointment, from the one to the other, keeping clear of the office of Postmaster-General from which he first retired?

I understood the plaintiff's counsel to contend that he could not, for that the seventh clause contemplates only one resignation, not repeated resignations. The argument on the plaintiff's side is, "You held the office of Postmaster-

general when you were elected, and could therefore after your election retain it, and your seat. Whenever you pleased you might resign that office, as you did, and take another of the departmental offices in question, and your seat would not be *thereby* vacated, provided you took the new office within a month; but when you had done this, the privilege given by the seventh section was exhausted." The plaintiff, in arguing thus, insists in effect that the word "*thereby*," in the last line but one of the clause, is necessarily to be referred to the first resignation, as if the legislature had said that the officer shall not vacate his seat by resigning the office *which he held when he was elected*, and by accepting another of the offices within one month after *such resignation*.

The defendant's argument, on the other hand, is that the legislature have not so expressed themselves, and that he is therefore not to be so confined in his privilege, and cannot have a penalty inflicted upon him by extending the effect of words beyond their obvious meaning, or supplying words which the legislature has not used.

He says, in effect, "When I accepted the office of President of the Council, in the manner allowed by the statute, and without vacating my seat, I was legally a member of the Assembly, holding at the same time the office of President of the Council, and might, *whenever* I pleased, and if the government would allow it, resign that office and accept any other of the offices referred to; being still as much entitled to the privilege conferred by that clause as I was when I held the first office."

My opinion is that we cannot impose a penalty upon the defendant by adopting any narrower construction of the act.

The word "*whenever*," in its common acceptation, means "as often as," though it may in some cases, according to the context, be understood to mean at "whatever time it shall happen," &c., and so, perhaps, to point only to one occurrence of the kind intended to be provided for. I think we are to give the word its ordinary sense, and that if by such construction the acts of resignation and acceptance are allowed to be repeated, the limitation of the month, and the

provisions that *thereby* the seat shall not be vacated, attach to each succeeding resignation.

Another question is then presented to us. Admitting that the defendant could again resign, and, without vacating his seat, have accepted any other of the offices referred to—that is that he could have made (of course with the concurrence of the Crown) more than one change—could he accept the same office of Postmaster-general, which he held when he was elected, and had since resigned ?

The plaintiff insists that he could not, because he could not have laid down his first office of Postmaster-general and taken it up again consistently with the words of the 7th clause, but could only accept “*any other* of the said offices,” and he relies on a principle often affirmed and acted upon, that what a man is forbidden to do directly he shall not be suffered to do indirectly, and that so the defendant cannot be allowed to return to the office he had first resigned by passing previously through another office ; and especially holding it but for a day, a proceeding by which it is complained he contrived to keep within the letter of the law, while he violated its spirit and intention.

The defendant, on the other hand, insists that the plaintiff has no right to claim a penalty from him unless he has done what the act according to its plain language and obvious meaning has prohibited ; that when he resigned his office of Postmaster-general on the 29th of July, and accepted the other office on the 6th of August, he did what he was allowed to do without vacating his seat. That he was then consequently a member of the Assembly, legally holding at the same time the office of President of the Council, and was in the same situation as if he had been President of the Council when he was elected to the Assembly : that he could occupy no intermediate position, and was therefore as much at liberty to avail himself of the 7th clause of the act as any other officer of the government, or as he himself was when he tendered his first resignation ; and that he had the same right to resign and take another office within a month, and not less the office of Postmaster-general than any other.

It is to be remarked with reference to the two questions

last discussed, that the seventh clause does not say that if any person holding the office of, shall resign, but *when-ever* any person holding shall resign, &c. The first form of expression would have seemed to refer more, though perhaps not decidedly so, to one operation of resigning and accepting, while the latter, being equivalent to "as often as," seems to admit more clearly of a repetition of the movement.

And with respect to the other point, the going back to the defendant's former office of Postmaster-general after the first change, the plaintiff's argument as to the defendant not being allowed to do indirectly what he could not do directly, would have more force if the seventh clause contained any express prohibition against returning to the same office, which it does not, any otherwise than that intending to allow a change, the legislature naturally fell into the language used, of resigning one office and accepting another, without which there could be no change. I see nothing in the statute to lead us to believe that the legislature, if they intended to allow the same officer to change more than once, which I think they did not mean to prohibit, had any intention of preventing his return to his original office from another.

I can conceive that there might be advantages to the public service from the officer resuming, with the consent of the Crown, his old department, but do not at present see any reason why there should be an intention to prevent it.

And upon this point in the case I will say that the defendant either had a right to resign the office of President of the Council and accept that of Postmaster-general, and still retain his seat in the Assembly, or he had not. If he had that right we could not hold him liable to the penalty by entertaining the presumption that when he resigned his first office he intended to accept it again within a month, or at any time.

I think, whatever conjectures may be formed in regard to what the legislature may be supposed to have intended by the seventh clause, that that clause does not in its terms restrict the permission to change from one departmental office to another, to one resignation and acceptance following

the officers election ; and that when the member of Assembly is in the second office, holding at the same time his seat under the permission given by the seventh clause of the act, he may, in making another change from thence, (of course by appointment from the Crown,) go back to the office which he held when his constituents elected him.

The act would not in my opinion sustain a more limited construction, at least not plainly and from the obvious import of its terms ; and we ought not, I think, to look out of the statute, and adopt any doubtful construction, in which men of sound understanding would not in general agree : and for two reasons. 1st. We must not strain a penal enactment in order to bring cases within it, (3 Ell. & Bl. 544.) And 2ndly. We must consider that if we depart from what we find to be the natural effect of the language used, and adopt a construction which does not properly arise upon the face of the statute, this consequence may happen in any such case—that the branch of the legislature whose privileges are concerned (or their proper officer, the speaker) if they should take a different view, and not feel themselves at liberty to add to or take away from the language of the statute, may sincerely believe that a vacancy has not been created, and that there is no authority for issuing a new writ. It would be a very embarrassing state of things if the Assembly, under their construction of the act, should decline to issue a writ, upon the conviction that the officer had a right to retain his seat in the Assembly, and a court of law should at the same time be adjudging penalties against the same officer for sitting and voting.

No conflict of this kind, or apprehension of it, should have the slightest weight with a court of justice to prevent their giving the full extent to a statute which its language warrants, but it ought to make them exceedingly careful to be right in their judgment, and not to adopt a construction of a statute unwarranted by its language, out of regard to any considerations which they are not at liberty to entertain.

Having thus given my opinion of what the statute does or does not allow, confining my view to its terms and the object

of it, which is to secure the independence of parliament, I will add, that I understand only by that object the securing the public against the effect of an injurious control or influence by the government over the conduct of the representatives of the people, by diminishing the temptation to accept office, and thus lessening the means of influence over the members of the legislature, by making promises of office, or encouraging expectations, and more than all by taking care at least, that with such exceptions as it has been thought wise to make, those who represent the people shall not hold offices which may subject them to the direct control of the Crown.

The provision made by the seventh clause is one dictated by obvious motives of public convenience, which would seem to apply as well in favour of repeated resignations as of one ; and it does not strike me that in this general view of the subject there is an apparent reason for imagining that it would be contrary to the spirit and intention of the act, if it be not contrary to the letter, that an officer, after resigning an office and accepting another, should be allowed to return from that other to the one which he held when his constituents elected him.

Several of the arguments in favour of the recovery of the penalty are founded upon the facts alleged, that when the defendant retired from his office of Postmaster-general, it was not *in order* to accept another office under the Crown, but because he had for the time at least, as he may have had reason to suppose, retired from office altogether : that when he took the office of President of the Council he had no office to surrender in exchange ; and that, so far from his creating a vacancy in one office when he filled the other, he had no office to vacate, and succeeded to an office which another had in the mean time held, and retired from, between resignation and acceptance of office by the defendant.

These objections we may take to be all founded in fact, but when we turn to the statute on which this suit is founded, we see nothing whatever on this point but the bare provision, that whenever a member of the Assembly holding one of the offices specified shall resign his office, and within one

month after his resignation accept any other of those offices, he shall not thereby vacate his seat in the Assembly. It appears to me we should be legislating, if we were to hold that he may avail himself once but not oftener of this permission, or that because he cannot consistently with the words of the act leave his office and accept it again within a month without having held any other office in the meantime, he has it not therefore in his power to return to his first office from any other.

I do not imagine that what is stated in the pleadings to have been done by the defendant was contemplated by the legislature when they passed their act; and it may not have been intended that the permission given in the seventh clause should be applied as it has been, but so far as any of the arguments that have been addressed to us are founded upon the existence in this province of a system of governing by political parties, which has long prevailed in England, and upon demonstrating that what has been done on the occasion referred to is inconsistent with the nature and principle of that description of government, I do not think we can entertain them. Those are considerations foreign to courts of justice. They regard mere political arrangements, not founded on statutes or on the principles of the common law, and such as we cannot suffer to influence our judgment, however expedient they may be in themselves. The circumstance that the defendant belonged to one political party or another, or that on one day eight other gentlemen retired from the offices which they respectively held, and the next day were replaced by others who retired, are circumstances which we cannot allow to guide us in construing the language of an act of parliament.

There are also statements introduced into the pleadings for supporting arguments of another kind, which statements I think we are called upon to say ought not to be found there, and of which I can take no other notice than by observing that I disclaim any right to sit in judgment upon the motives which have governed Her Majesty or her representative in bestowing offices, or in the exercise of any other power reposed in them by law.

There are eight counts in the declaration, some of them charging that the defendant sat in the Assembly after he had vacated his seat, and others that he voted, the statute being in the disjunctive, and making the penalty of £500 attach upon any one who shall sit *or* vote in the Assembly while so disqualified.

By the pleadings the right to recover has been made to turn upon the questions to which I have adverted, the issues in law being raised in regard to some of the counts by the plaintiff demurring to the plea, or the rejoinder of the defendant, and in others by the defendant demurring to the plaintiff's replication.

The plaintiff's counsel stated at the opening of the argument, that the object was not really to recover and enforce penalties, but to obtain the judgment of a court of law upon an important constitutional question.

Our judgment, however, has necessarily been formed upon the consideration that the case does in fact call for our opinion upon an allegation of a double forfeiture by the defendant, first of his seat in the Assembly, and next of the penalties imposed upon him for acting as if he had not vacated his seat when in fact he had, and that we must administer the law in that view.

Whether the seat was vacated or not is a question that must have been or must be dealt with by the Legislative Assembly itself, so far as regards supplying the vacancy that would be created, and one that we can only determine incidentally in deciding upon the plaintiff's claim to penalties.

In deference to the earnestness and ability with which this case and another depending on the same question were argued at the bar, I have dwelt longer than was really necessary upon one or two points of the case which appeared to us to be, as soon as we had examined them, perfectly plain.

My opinion on the whole case in substance may be shortly expressed.

In order to entitle the plaintiff to recover upon any one of the counts in the declaration, it is indispensable that we should find it established by admission upon the pleadings

(since we are dealing only with issues of law, and there has been no occasion for the intervention of a jury), that the defendant did vacate his seat in the Assembly by the acceptance of office.

That he was legally holding the office of Postmaster-general and a seat in the Assembly on the 29th of July is undisputed.

Whether upon what we find in the pleadings he can be held to have vacated his seat in the Assembly by acceptance of office after that day, depends entirely upon the provisions of the statute 20 Vic., ch. 22. And it appears to me that giving to the seventh section of that act the construction which its language demands, no one who was holding in July any one of the offices mentioned in the third clause, and holding at the same time a seat in the Legislative Assembly, can be held to have vacated his seat by resigning that office and accepting another of the enumerated offices within one month, whatever may have been his private or public motive for resigning or accepting.

Whether the sustaining what was done in this case as being literally sanctioned by the act be, or be not incompatible with the due and fair working of what is called responsible government is not a question for us, but points rather to a re-consideration of the statute by those who can alter its provisions, if they find that it has been perverted to a purpose not foreseen, and therefore not duly guarded against.

I have gone through the pleadings as particularly as the number of other cases argued within the last few days, and demanding our attention, would permit.

It appears to me that the conclusion which I have expressed will determine the issue upon each of the counts; but if a more critical application to them is necessary, with a view to costs of the several pleadings, independently of the substantial points to be decided in the case, I must take time to go over them again more at leisure, which I have no doubt the parties will not find inconvenient. My judgment is in favour of the defendant on the legal questions submitted to us.

MCLEAN, J.—This is an action to recover penalties alleged by the plaintiff to have been incurred by defendant in consequence of violations of the third and fifth sections of the act 20 Vic., ch. 22, passed further to secure the independence of parliament.

The object contemplated by that act is one which, judging from the number of enactments passed on the subject, and the stringent provisions adopted for securing it, seems by the legislature to have been regarded as of paramount importance. They would not otherwise have felt themselves called upon to abridge the rights of individuals to vote for or to be elected as members of the Legislative Assembly or Legislative Council. The great object appears to be that no one holding any office or contract to which any emolument is attached derived from the Crown, shall be elected or returned as a member of the legislature; and to guard against such a result the judges of the land, though in their position alike independent of the Crown and people, and a large number of persons holding offices, and deriving small incomes for their services from the government, are not only disqualified and rendered incompetent to vote at any election of a member of the Legislative Council or of the Legislative Assembly, but are subjected to a penalty of £500 for voting at any such election, which amount may be recovered by any person who shall sue for the same.

As if this were not enough to deter such dangerous persons from invading the independence of parliament by voting at elections of members, it is further provided, that if any one chooses to incur a penalty of £500 for the privilege of voting, his vote shall be *null and void to all intents and purposes*. It must be presumed that this gross infringement of individual right could scarcely have been considered justifiable but for the purpose of securing a great public good—the independence of parliament. Then further to ensure that most desirable object, it is provided by the third section of the act, “That no person accepting or holding any office, commission or employment, *permanent or temporary*, at the nomination of the Crown in this province, to which an annual salary, or any fee, allowance or emolument, or profit of

any kind or amount whatever from the Crown is attached shall be *eligible* as a member of the Legislative Council or of the Legislative Assembly, nor shall he *sit* or *vote* in the Legislative Assembly, or in the Legislative Council as an *elected member* thereof, during the time he holds such office, occupation or employment." From this absolute exclusion from either branch of the legislature any person who shall be a member of the Executive Council, or who shall hold any of the following offices, is declared by the proviso which follows to be exempted: that is to say, a member of the Executive Council, Receiver-General, Inspector-General, Secretary of the Province, Commissioner of Crown Lands, Attorney-General, Solicitor-General, Commissioner of Public Works, President of Committees of the Executive Council, Minister of Agriculture, or Postmaster General; and the person holding any of these offices is declared not to be disqualified from sitting or voting in either house, *provided* he be elected *while holding such office* and *not otherwise disqualified*. The holders then of these several offices are eligible to be elected, and they may sit and vote *if elected while holding* any of these offices; and by the second proviso to the same section officers in her majesty's army or navy, or any officer in the militia, or any militia-man (except officers on the staff of the militia receiving permanent salaries), are declared not to be ineligible or disqualified from sitting or voting in either house of the legislature. By the fourth section another class of persons, namely, contractors with government, or for any purpose for which provincial moneys are paid, are declared incapable of being elected, and disqualified from sitting or voting in the Legislative Assembly or in the Legislative Council as elected members thereof.

By the fifth section it is provided, "That if any person by that act disqualified or rendered incapable of being elected a member of the Legislative Council or of the Legislative Assembly, shall nevertheless be elected or returned as a member of either house. his election and return shall be *null* and *void*; and if any person hereby disqualified or declared *incapable of sitting or voting* in the Legislative Council or in the Legislative Assembly shall presume to sit or vote

therein, he shall thereby forfeit the sum of £500 *currency* for *each* and *every day* on which he shall have so sat or voted, and such sum *may be recovered* from *him* by *any person who shall sue for the same*, by action of debt, bill, plaint or information, *in any court of competent civil jurisdiction in this province.*"

The plaintiff in this action is proceeding against the defendant for penalties alleged to have been incurred by him by sitting and voting as a member of the Legislative Assembly while holding the several offices of President of the Executive Council and Postmaster-General, without having been elected while holding either of these offices. At first view I was inclined to think that the penalty only attached where an individual declared incapable of being elected, or of sitting or of voting in either house, was elected and returned, and presumed to sit and vote in the house ; but on further consideration I have no doubt that either of the officers holding any of the offices specified will be equally liable to the penalty if he presumes to sit or vote without being elected while holding such office, unless the office be one which he may hold by the provisions of the seventh section of the act without vacating his seat.

That section declares that "*whenever* any person holding the office of Receiver-General, Inspector-General, Secretary of the Province, Commissioner of Crown Lands, Attorney-General, Solicitor-General, Commissioner of Public Works, Speaker of the Legislative Council, President of Committees of the Executive Council, Minister of Agriculture or Postmaster-General, and being at the same time a member of the Legislative Assembly or an elected member of the Legislative Council, shall *resign his office*, and *within one month* after *his resignation* accept any other of the said offices, he shall not thereby vacate his seat in the said Assembly or Council."

Under the previous section the acceptance of any office or becoming a party to any contract or agreement would render void the election of any member of the Legislative Council or Assembly, and of course would render such member incapable of sitting or voting in either house until re-elected, and he could only be re-elected if holding one of the offices

enumerated in the first proviso to the third section of the act. It is admitted on the record that this action is not for the recovery of any penalties for sitting or voting in the Legislative Assembly prior to the resignation by the defendant of his office of Postmaster-general. The penalties claimed for the defendant are for sitting and voting as a member of the Legislative Assembly without being re-elected after being appointed to the office of President of the Executive Council, and after being subsequently again appointed to the same office previously held by him—that of Postmaster-general. It is alleged in defendant's pleas, and not denied by the plaintiff, that the defendant was elected, and sat and voted in the House of Assembly, after his acceptance of the office of Postmaster-general: that within a month of his resignation of that office he was appointed to and accepted the office of *President of the Executive Council*, which office both plaintiff and defendant appear to consider the same as *President of Committees of the Executive Council*, the office specified in the statute: that he resigned the latter office, and was appointed to and accepted the office of Postmaster-general after having so resigned, and within a month of his resignation of his first office. These allegations are not denied, but the plaintiff replies to them that though defendant was appointed to the office of President of the Executive Council within a month after his resignation of the office of Postmaster-general, yet that appointment being colourable, and being conferred and accepted for the sole purpose of enabling the defendant to be appointed to and to resume his former office of Postmaster-general, must be held as in fact no appointment, and that the defendant's return within a month to the same office which he had resigned not being authorized by the statute, his seat in the Legislative Assembly became vacated, and defendant became liable to the penalties for sitting and voting therein as a member. It is further alleged by the plaintiff that after the resignation by the defendant of his office as Postmaster-general, that office and all the other offices enumerated in the statute were filled up by the appointment of other persons, so that the defendant could not after such resignation

accept or be appointed to any of them, and that defendant, by the acceptance of office after the resignation of their several offices by such persons, vacated his seat in the Legislative Assembly, and became liable to the penalties imposed by the act for sitting and voting therein without being re-elected. It is also alleged as a ground of demurrer to defendant's plea, and it was contended on the argument, that the defendant having resigned *without having it in contemplation* to accept any other of the specified offices, thereby was disabled from accepting any other office within a month, and that having accepted of such office he vacated his seat under the sixth section of the act, and having thereafter sat and voted in the Legislative Assembly without having been re-elected, that he became liable to the penalty imposed by the fifth section. Under these circumstances it becomes important to enquire to what extent the seventh section goes in sanctioning the resignation of any one of the offices specified in the statute, and the acceptance of any other of them within a month. It appears probable from the terms of the section that its object was to enable a change from one office to another to be made by any incumbent within a month, without the necessity of being re-elected. The section does not contemplate or provide for a return to the same office, and probably for this simple reason, that it could scarcely be supposed that any of the persons holding either of the offices would resign his office and desire to return to it again within a month; but a return to the same office would, as it appears to me, be less objectionable than an appointment to another office without re-election, inasmuch as the approval of the electors must be signified on the first appointment but not on the other. In the case of the defendant, his constituents expressed their continued confidence in him after his acceptance of the office of Postmaster-general, but after his resignation of that office and his appointment to the office of President of the Executive Council within a month any such expression of opinion was rendered unnecessary by the act. It was no doubt considered a matter of public convenience that the persons called upon to fill the offices in the public executive depart-

ments should be at liberty, after being once elected, to make any arrangements between themselves as to the holding of these offices which might be most advantageous, without being obliged to undergo the trouble and incur the expense of another election, and certainly the seventh section of the act, construed according to its plain and obvious meaning, gives such a power to these officers. "Whenever any of them shall resign *his* office, and within a month accept of any other of these offices, he shall not *thereby vacate his seat* in the Legislative Assembly or Council.

This plain provision cannot, I think, be so restricted as to be taken to sanction only one change of office without vacating a seat in parliament. The whole clause, I think, must be taken to mean that as often as any person holding either of the offices enumerated shall resign and accept any other of such offices within a month, he shall be at liberty to do so without vacating his seat in the Legislative Assembly or Council. If this construction then of the clause be adopted, and it appears to me to be the true one, the defendant might legally resign his office of Postmaster-general, and within a month accept of the office of President of the Executive Council ; and he might resign his situation of president of the Executive Council, and accept of any *other of the offices* specified within the time limited. Then it is plain that the office of Postmaster-general is *another* of these offices, and the fact of defendant having once before filled the same office could not abridge his right to accept of any one of the other offices on his resigning the office of President of the Executive Council.

In considering this case by itself, and upon its own merits, as we are bound to do, we are not at liberty to give a different construction to the act of parliament on which the case depends, because several or all the other persons holding the several offices specified in the act may have done as he has done and eventually settled down in their former offices. The several changes which led to that result may have been intended for that purpose, and may have been adopted as a contrivance for that end, but if sanctioned by the words and meaning of a legislative enactment, we cannot assume the

power of changing the terms of that enactment so as to deprive them of the benefit of it, and thus expose them to the payment of heavy penalties. As to the policy or propriety of such a law, or the proceedings under it, we are not called upon to pronounce any opinion. The observance and enforcement of strict legal right may not always be commendable, but it does not rest with courts of justice to condemn or find fault with such a course : their plain and only duty is to construe the law as they find it according to its obvious meaning, and if in doing so the intention of the legislature cannot be carried out, it is always competent to the legislature to change the law so as to give effect to their wishes.

I have not referred to the state of the pleadings in this case, which are very long and somewhat perplexing, but have preferred to refer to the subject matter in controversy in its general aspect, the whole question as to the liability of the defendant resting on the construction of the sections of the act under which he justifies his several acceptances of different offices after his resignation of other offices.

If the intention of the last act was to exclude all persons holding office at the nomination of the Crown to which any emolument is attached, the provisions of the third section seem to be less stringent than those of the second section of 16 Vic., ch. 154. In the latter case all persons holding offices of emolument at the nomination of the Crown were excluded from seats in the Legislative Council or Assembly, no matter where such emolument was derived from. In the present act only persons deriving salaries or fees, or emoluments or profit of any kind or amount *from the Crown*, are declared to be ineligible, so that sheriffs, registrars, clerks of the peace, county attornies, and others whose incomes are derived from fees from individuals for services rendered, appear now to be eligible for seats in either house of the legislature without being subject to the penalties to which others are declared liable who receive even smaller incomes *from the Crown*. This probably was not intended, but the insertion of the words "*from the Crown*," in the third section, seems certainly to have the effect which I have men-

tioned. I have, after much consideration of the case and pleadings, come to the conclusion that the defendant is entitled to judgment on the demurrers.

BURNS, J.—The questions presented on the various counts, and the different pleas and replications in truth amount to but two: *first*, whether the defendant, by resigning office after his election to the Legislative Assembly, while he held the office of Postmaster-general, and afterwards accepting the office of President of the Council, and sitting and voting in the House of Assembly without re-election, has rendered himself liable to the penalties imposed by 20 Vic., ch. 22; and *secondly*, though he may have rendered himself liable to such penalties, yet whether he comes within the provisions of the 7th section of the act.

The first of these questions could not have arisen under the 18 Vic., ch. 86, though the second might, for the 7th section of the 20 Vic., ch. 22, is a transcript of the 3rd section of the other act.

It appears to me the defendant, after resigning the office of Postmaster-general, and accepting the office of President of the Council, and then sitting and voting in the Assembly, if there were nothing else to be considered, has rendered himself liable to the penalties. The third section of the act disqualifies one class of persons from being eligible to be elected, or to sit and vote, with certain exceptions, however; and the fourth section disqualifies another class of persons in like manner. The fifth section imposes penalties upon persons who are disqualified to be elected, and also upon those who by the act are disqualified, or declared incapable of sitting or voting in the Legislative Assembly. These penalties apply to all alike, both to those coming under the third section as well as those coming under the fourth section. The third section exempts persons holding certain offices from being disqualified, provided they be elected while holding such offices, and be not otherwise disqualified. The defendant was one of those persons, but resigned his office while still a member of the Assembly. The question is whether upon a re-appointment to office he is required to be re-elected. I think the 6th

section of the acts put this beyond doubt. The resignation of the office held while he was elected places the defendant in precisely the same situation as if he had no office when first elected, with regard to vacating his seat, after accepting office again. The 6th section must, I think, be looked upon as cumulative to the other, and not a provision applicable merely to a single class of persons. It will be seen that it embraces all mentioned in both the third and fourth sections, and by the declaration that a person may be re-elected as a member of either House, if he be eligible under the first proviso of the third section, shews, I think, that it was contemplated that acceptance of office while a person was a member involved a re-election. His first election while holding the office would not be sufficient to cover the holding of office after he had resigned that which he held when elected. Taking this section to mean that the defendant's seat by his acceptance of the office of President of the Council is declared vacant and that there must be another election, then I do not see how it is possible to say otherwise than that the third section disqualifies the defendant from sitting or voting in the Assembly, and for that act the 5th section imposes a penalty.

The next question is a much more difficult one to dispose of. The provision respecting accepting another office, after resignation, provided it be done within a month, is imported from the 18 Vic., ch. 86, and 16 Vic., ch. 154, into the last act. A good deal of argument, and it is disclosed upon the pleadings, is, that after the defendant resigned the office of Postmaster-general, the office was filled by some other person, and that before the appointment of the defendant to the office of President of the Council, that office was filled by another person, and that the defendant did not merely make an exchange of offices, as it is urged the section means. We can take no notice of the circumstance which is sought to be imported into the case, that there had been a complete change of persons and party with regard to all the offices mentioned in the 7th section of the act under consideration, with a view to construe the meaning of the act. To give the proper interpretation we must look at what the law was when the act was passed, what was intended to be remedied by it, and the

language used in the enactment itself. Extraneous matter beyond this can have no bearing upon the determination. It may be that the legislature contemplated, as has been argued, that it was a provision for the exchange of offices in the same administration while the administration remained in power. The legislature has not, however, said so, but simply have said that any person holding any of the offices named may resign his office and take any of the other offices within a month, and if he does he shall not thereby vacate his seat. It is to be observed that the legislature has carefully abstained in all the acts from mentioning or alluding to party or political changes in any way whatever, and therefore, if the seventh clause is to have the construction placed upon it the plaintiff contends for, there would be an absolute necessity for the court to look at extraneous matters and to take judicial notice of the political changes of party and administrations. I apprehend it was wise in the legislature not to make mention of or notice the political changes in their enactments, for if they had done so an encumbrance upon the working of the constitution must very soon have been felt, and might have been extremely difficult to have been remedied, if indeed it could have been at all accomplished by the legislature. As it is now, the political constitution is elastic, and capable of being moulded from time to time to suit circumstances, by mere resolutions of the majority. I am not therefore surprised that we find nothing in the acts to guide to a solution that the legislature in the 7th section contemplated political changes, though I think it not unlikely, if their attention in making the enactment had been called to a state of things such as disclosed upon this record, the section would not have been worded precisely as we find it.

Then with respect to the going out of the acts in order to find an interpretation, and to import into the case that the court must take judicial notice of political changes, I must say I never can consent to that. I can find no authority for such a position, and to say the least of it, I think it would be a most dangerous power to assume, and one that no judge is warranted in doing. If it is to be that a court must do so, the legislature must first say so.

The defendant, then, as to accepting the office of President of the Council, after he resigned the office of Postmaster-general, literally did what the clause of the act says he might do. Suppose it to be conceded that an enquiry might be made under what circumstances he did so, in order to say whether he was liable to penalties because he had not been re-elected to the House of Assembly, after he accepted the office of President of the Council, though within a month, the section would immediately present a variety of questions, to which I certainly cannot see how an answer could be given than the one in this case. We will take the case of any given administration, and it was thought advantageous that half the number composing it should retire, and that their places should be filled by an equal number of another political party, but in the distribution of office it was deemed advisable that those who remained in should change their offices for others within the month, would those who changed be liable to be re-elected to the new office? Or suppose the number be increased of those retiring, to leaving only one of the whole number, and he changed from his office to one of the others, would he require to be re-elected? Again suppose this case: it is found that on the half of an administration, or any given number, retiring, and persons from another political party supplying the places, that the new men and the old cannot work together, and the old retire, and those of the new find that they could work well with those, or any of them, first going out, could those first, or any of them, return to office within the month, by change of office from what they held at first? I cannot imagine any one bold enough to argue to a court, that it is to consider the proposition of the political change in any given cabinet or administration which may exist as to persons going in or going out, and I cannot but think the section in question would sanction all and every of the cases I have put. The only answer which can be made is the one upon which this case is put: namely, that here the whole administration resigned, and their places were filled with others in the interval. That may be an argument to use before the legislature as a question of policy, whether that

body would or not sanction it, but it is an extremely weak one to use to the court when construing penal acts affecting individuals. In this case the defendant, as far as the court has to deal with him, in the penalties he may have incurred, is not answerable for the conduct of those who may have held office with him: he can only be made answerable for his own conduct. I have already said political conduct is not an ingredient upon which the court can be called to pronounce. We have simply to say whether the 7th section of the act saved the defendant from the penalty imposed by the 5th section, when he took the office of president of the Council, and I really cannot imagine there can be two opinions about that question, that he did not thereby vacate his seat.

The next question is, whether the defendant incurred the penalty when he resigned the office of President of the Council and took the office of Postmaster-general, and when holding that office sat and voted in the House of Assembly, without being re-elected either as President of Council or Postmaster-general. The argument, and the eighth count of the declaration is, that the defendant accepted the office of President of the Council as a mere colour, to enable him afterwards to take the office of Postmaster-general, and that this change is not sanctioned by the seventh section of the act. Much of the argument respecting political changes is again repeated upon this question; but the simple question to be determined upon the legal construction of the act is, whether the power given by the act of resigning one office and taking another is exhausted by the person making one such change, or whether it may be repeated by the same person. The 8th count, as framed, I may observe, does contain matter which perhaps might be treated as impertinent to the matter at issue, if the matter were upon motion to strike it out. It will be observed that the framer of it has introduced argument to shew that he considers the facts stated prove the acceptance of office to have been colourable. This is never allowed. Taking the facts as stated, and putting out of the question all argument contained in the count, the question is, whether the seventh section of the act leaves the penalty fixed by the fifth section untouched, as applicable to the defendant's case after he

accepted the office of Postmaster-general. The words of the act are, that *whenever* any person holding the office, &c., shall resign his office, and within a month after his resignation accept any other of the said offices, he shall not thereby vacate his seat. The dictionaries all tell us that the meaning of the word *whenever* is *at whatever time*, and the rule of interpreting an act of parliament is to read it in the present tense as being applied to the particular case when read that is under consideration, unless the words otherwise import. If the one change from Postmaster-general to that of President of the Council exhausted the meaning of the word *whenever*, then of course the plaintiff would be right in saying the defendant had incurred the penalty of changing from the office of President of the Council to some one of the other offices. I cannot adopt that construction. I do not see what there is, unless it be that some matter of public policy should be introduced, to restrain a person going the round of the offices, and the word *whenever* always applies. I have not failed to consider the proviso in the proviso to the third section, namely, provided he be elected while holding *such* office. The sixth section, however, must also be looked at, and that is that any member accepting office his election shall thereby become void; and the seventh is, that *provided*, whenever any person holding any of the offices enumerated shall resign his office, and accept another of the said offices within a month, his seat shall not thereby be vacated. If a person may go the round of all the offices I do not see why he may not come to and take the one he had at first. The plaintiff says the change is only a colour to enable the defendant to do that which the act does not sanction. In that argument it is assumed that the act does not sanction taking back the same office. Now, I do not see that we can assume any such thing on the act of parliament. There is no prohibition against taking the same office again, after having held another; the argument must be that it is to be inferred that it is so. It must be remembered we are dealing with a question of penalties, in which case the language of the legislature must be so plain that no room is left for doubt. Whether the legislature, as I have already observed, would have worded

this clause as it is, if such a case be presented to us had occurred to them, is not for us to enquire. Nor is it for us to enquire whether it be expedient to the public to adopt the construction contended for. We do no more than pronounce upon the construction of the act as affecting this defendant individually, as we would upon any other statute affecting him or any other person. Questions of public policy have nothing to do with the construction of the act in this case, for it is impossible to go into that point without importing into the case political changes and controversy, which the legislature has carefully abstained from doing in their laws upon the subject of the independence of parliament, and which I am sure every one who wishes to see the laws impartially administered would never agree that a judge should do. I think that judgment should be given for the defendant.

Judgment for defendant on demurrer.

MCDONELL V. VANKOUGHNET.

This was an action brought by the same plaintiff, involving the same questions as the last case, the only material difference being that defendant was charged as a member of the Legislative Council.

C. S. Patterson, and *D. E. Blake*, for the plaintiff.

R. A. Harrison, contra.

ROBINSON, C. J., delivered the judgment of the court.

By the 21st section of the 19 & 20 Vic., ch. 140, the statute of this province of the 20 Vic., ch. 22, is, by virtue of the authority given by the imperial act 17 & 18 Vic., ch. 118, made applicable to the Legislative Council as well as to the Assembly ; and consequently the same questions which have been raised in the case of *McDonell v. Smith* with reference to the effect of a member of the Assembly resigning, and accepting any of the offices enumerated in the 3rd section of the 20 Vic., ch., 22, and in respect to penalties

for violating the provisions of the last mentioned act, apply equally to the members of the Legislative Council.

The demurrers in this case bring up questions which we have just decided in the case of *McDonell v. Smith*, and according to the view which we have taken of the 7th clause of the act 20 Vic., ch. 22, judgment must in this case be given for defendant on both the demurrers.

We think that the permission given to a member to resign his office (being one of those enumerated in the 3rd section,) and within one month to accept another, without vacating his seat in the Assembly, is not given in such terms, by the 7th clause, whatever may have been intended, that we can hold this defendant's seat in the Legislative Council to have been affected by the circumstance that he did not pass immediately from the one office to the other, or resign the one with the present intention in his mind of accepting the other, nor by the circumstance that in the interval between his resignation of the one and acceptance of the other the office to which he was last transferred had been held by a gentleman who succeeded to it after the defendant's resignation of the first office, and had made way for another man, but who resigned when this defendant accepted it.

The changes in the government set forth in the replication demurred to do not, as we think, warrant us in holding that the defendant, by resigning his office of President of the Council, and within one month accepting that of Commissioner of Crown Lands, vacated his seat in the Legislative Council.

There is nothing in the 7th clause to justify us in holding that the resignation of the one office and the acceptance of the other must be contemplated at the same moment, and must be capable of being carried into effect at the instant; in other words, we think that we cannot adjudge that the defendant is liable to a penalty on that ground, for the statute says nothing about exchanging offices, nor about leaving one in order to take the other, but only that one may be resigned, and any of the others accepted within the month.

Judgment for defendant on demurrer.

HAGGART V. KERNAHAN.

Replevin—Right to recover for part.

In replevin under 14 & 15 Vic., ch. 64, the verdict is divisible, so that the plaintiff may recover for whatever part of the goods he proves himself entitled to, and defendant for the rest.

“From lots 1 to 13” excludes both 1 and 13.

REPLEVIN for 277 pieces of white pine timber.

Pleas.—1. *Non cepit*. 2. That the timber was not the property of the plaintiff.

At the trial at Perth, before *Richards, J.*, it appeared that on the 11th of January, 1858, a license was granted by the government to the plaintiff, under 12 Vic., ch. 30, and regulations made on the 8th of August, 1851, to cut red and white pine and all other timber upon the lands thus described. To extend from lots No. 1 to 13 in the 1st range, and 2nd, 3rd, and 4th ranges of the township of Olden, the half of adjoining road allowance included with each lot, if vacant Crown lots at this date; Canada Company, Clergy lots excepted, and Indian lots; and lots Nos. 8 and 2 in the 1st range, 9, 10, 12, and 16 in the 2nd range, west half of Nos. 1, 2 and 8 in the 3rd range, and Nos. 2, 3, 6 and 12 in the 4th range also excepted.

The license expressed that it was to be in force till the 30th of April, 1858, and that by virtue of the said license the plaintiff had right, by the Provincial Statute 12 Vic., ch. 30, to all timber cut by others in trespass on the grounds thereby assigned, with full power to seize and recover the same any where within this Province.

The plaintiff gave evidence of 277 pieces having been cut on lots which the plaintiff claimed to be within her license, but 146 pieces of that number had been taken from lot 13 in the 4th range, and the defendant contended that that lot was not included in the license. The plaintiff offered to give evidence as to what was intended in that respect, but the learned judge held that such evidence was inadmissible.

The defendant's counsel also objected that the evidence was not sufficient to establish the identity of the timber seized with that which had been discovered to have been taken from the plaintiff's land; and that it was not proved

that the timber had been cut within the period covered by the license, and so that it was not shewn that the plaintiff had certainly a right to it.

The learned judge left to the jury these questions of fact upon the evidence, and by consent leave was reserved to the defendant to move to enter a verdict in his favour, if the court should be of opinion that there was no proof of identity to go to the jury; or if the court should be of opinion, as the defendant contended, that 146 pieces appearing to have been cut on lot 13 in the 4th range, were not cut on land covered by the license, and that the consequence of the plaintiff not being entitled to recover for that portion of the timber claimed would be to entitle the defendant to a verdict in his favour as to all.

J. S. Macdonald, Q. C., obtained a rule *nisi* to enter a verdict for defendant, or for a new trial.

Deacon shewed cause, and cited *Provincial Insurance Co. v. Maitland*, 7 C. P. 426; *Crawford v. Thomas*, 7 C. P. 63; *Mennie v. Blake*, 2 Jur. N. S. 953; *Neilson v. Harford*, 8 M. & W. 806, 823; *Sills v. Hunt*, 16 U. C. R. 521; Jur. July, 1858, p. 616; 14 & 15 Vic., ch. 64, secs. 1, 7, 8; 12 Vic., ch. 30, secs. 2, 7, 8.

ROBINSON, C. J., delivered the judgment of the court.

The evidence, in my opinion, was sufficient to go to the jury both in regard to the timber being cut within the period covered by the plaintiff's license and the identity of the timber which had been cut on that land with the timber replevied under the plaintiff's writ. Looking at the whole evidence and at the defendant's conduct in the matter, I think the jury came to a proper conclusion upon both points.

As to the lot 13, it was not included in the license, the words "*from lots 1 to 13*" excluded both 1 and 13, and gave only the privilege upon lots between.

There is therefore only the question whether the plaintiff's claim is divisible, so that in this form of action the plaintiff can recover for the quantity of timber cut upon the land, rejecting the 146 pieces proved to have been cut on lot 13.

I think it cannot be held that the verdict in replevin under our statute is not divisible, since replevin is allowed to be brought generally in cases where trespass or trover would lie. If the party is intended to be favoured by having the means provided of getting the very chattels he claims, instead of damages according to their value, the effect would fall far short of the intention, if any mistake in regard to a single article among many that have been replevied, must turn the verdict against him for every thing.

In a late case in this court of *Sills v. Hunt*, cited in the argument, we held, in a case like this, where lumber had been replevied, that the plaintiff might recover for a portion which he proved had been cut off his land, though as to another portion he failed to satisfy the jury that it had been taken from his land.

The verdict must be entered for the plaintiff, for 131 pieces, and for defendant for 146 pieces.

BURNS, J.—The plaintiff is not entitled to recover for the timber cut on lot No. 13, for that certainly was not granted by the crown license to the plaintiff. It does not appear to me the defendant can claim that the remedy by replevin cannot be sustained, because he has himself caused such a mixture of the plaintiff's property with his own that it is difficult to identify the plaintiff's property. Undoubtedly either trespass or trover would lie, notwithstanding the defendant had so acted, and it may be asked, is his conduct to free him from the specific remedy of replevin?

No doubt there must have been a possession or a constructive right to the possession of the property in order to enable the plaintiff to sue out the writ. Here the plaintiff had the right of the Crown to the timber while it was standing, and also had the right of the Crown to seize and take it after being cut any where within the province. A plaintiff must satisfy a jury as well as he can what quantity of goods or property taken from a larger quantity of like goods or property is his.

The defendant asks for a new trial as respects the whole quantity of goods, because the verdict cannot be entered

distributively, and for that the bond given contemplates a delivery back of the whole property replevied. How the plaintiff's bond may be framed we do not know ; it is not before the court ; but however that may be, I apprehend it can make no difference. The 4th section of the Replevin Act, 14 & 15 Vic., ch. 64, enacts that the condition of the bond is to be altered to correspond with the writ authorised by the act.

The same rule must prevail in an action of replevin as in others where the right of property is involved, namely, that the verdict may be distributive.

In actions for the recovery of damages it is otherwise, for the plaintiff will only recover damages for such property as he proves to be his. When a question is made as to title, either as to lands or goods, there, in order to dispose of the whole question submitted, it may become necessary that a verdict may be given one way as to part and another way as to other part. It is correct to enter in that way, and the defendant should have a verdict entered for him as to the timber cut upon lot No. 13.

MCLEAN, J., concurred.

Rule accordingly.

MCCORMICK V. OAKLEY.

19 & 20 Vic. ch. 97—*By-law—Imposition of rates—Pleading.*

Replevin.—The defendants avowed under a by-law of the city of London, passed under the 19 & 20 Vic., ch. 97, on the 11th January, 1858, averring that the amount of real property benefitted by certain sewers mentioned in the by-law and statute was £29,508 “according to the assessment returns for the same and the said by-law”: that a rate was directed to be levied on the proprietors of such property, of whom the plaintiff was one, and that on his refusal to pay defendant as collector seized his goods. The plaintiff demurred, on the ground that the rate imposed by the by-law was for 1858 upon the assessment returns of 1857, whereas it should have been upon the assessment of 1858; but *held*, (confirming the judgment of the court below,) that the plea was good.

APPEAL from the county court of the county of Middlesex

Replevin, for taking the plaintiff's goods in lot No. 11, on the south side of Horton street, in the city of London.

Avowry, that before the said time when, &c., by virtue of the 19 & 20 Vic. ch. 97, it was provided that whereas the sum of £16,000, part of the debt of the city of London, was contracted in the construction of certain main sewers in the said city, and at the time such sewers were directed to be made it was the intention of the corporation that a considerable portion of the costs of such sewers should be raised by assessing the proprietors of such real property as might be immediately benefitted by such improvements; but no by-law was ever passed by the town council of the town of London for that purpose; and by the said act it was, amongst other things, further provided and enacted, that it should and might be lawful for the mayor, aldermen, and commonalty of the city of London, to assess the proprietors of such real property in the city of London as might abut upon any public street, highway, square or place, through which the said sewers might pass, or immediately opposite or near to such sewers, for such sum or sums of money yearly, in like manner as the common council of the said city of London are by the said act empowered to impose assessments for the redemption of the debentures to be issued under the authority of the said act; and the defendants further say, that after the passing of the said act, and before the commencement of this suit, and before the said time when &c., to wit, on the 11th of January, 1858, the

mayor, aldermen, and commonalty of the city of London, according to the statute in that behalf, and in pursuance of the aforesaid in part recited act of parliament, duly made and passed a by-law to raise the sum of £11,400 to defray the cost of the construction of certain main sewers in the city of London, by special assessments on the proprietors of such real property as may be benefitted by such sewers; that is to say, certain main sewers constructed in the city of London, which may be known and described as follows, &c., (setting out the descriptions): and the defendants further say, that the sewers referred to in the said act of parliament and mentioned in the said by-law are the same sewers, and that the by-law so passed as aforesaid, amongst other things, provides that the said sum of £11,400, being a portion of the costs of constructing said sewers, should be borne and paid, according to the provisions of said act of parliament, by the proprietors of such real property in the city of London as abuts upon any public highway, square, or place through which the said sewers pass, or which is immediately opposite or near to such sewers, and for the purpose of paying such last mentioned sum, that there should be raised annually for the period of nineteen years the sum of £600, by special rate and assessment upon the proprietors of such real property as aforesaid; and the defendants further say, that the amount of real property as aforesaid benefitted by the said sewers is £29,508, according to the assessment returns for the same and the said by-law: and the defendants further say, that the said by-law so passed as aforesaid, amongst other things, enacts, under and by authority of the said in part recited act of parliament, that there be levied and raised annually for the period of nineteen years the sum of £600, by special rate, over and above all other rates whatsoever, upon the proprietors of all real property in the city of London which abuts any public street, highway, square, or place through which the said sewers pass, or which is immediately opposite or near to such sewers, for the purpose mentioned and provided in and by the said above in part recited act of parliament: and the defendants further say, that the said by-law requires and directs the city clerk of the

city of London to make out and deliver to the city collectors a roll, setting forth the several properties liable to the above rate, with the said special rate inserted therein of five pence in the pound : and the defendants further say, that the said by-law, amongst other things, enacts that it shall be the duty of the city collectors, immediately after receiving such roll, to proceed according to law, and collect the sum of £600 for the year 1858 : and the defendants further say, that the plaintiff, being the proprietor of lot number eleven on the south side of Horton street, and lot number eleven on the north side of Simcoe street, in the city of London, the said lots being real property abutting on Richmond street, through which the said sewer passes, commencing, &c., (repeating the description of this sewer), was duly rated and assessed by the mayor, aldermen, and commonalty of the city of London, by virtue of the said act of parliament and the said by-law, for the year 1858, in the sum of £2 1s. 3d., for the purposes in the said act and by-law mentioned : and the defendants further say, that the plaintiff being rated and assessed, the city clerk in the said by-law mentioned, afterwards, and before the said time, when, &c., and before the commencement of this suit, delivered to the defendant William Oakley, then and still being collector of that part of the city of London wherein the said lots are situate, a roll setting forth the several properties and proprietors liable to the said rate : and the defendants further say, that according to said roll the plaintiff, so being proprietor of the said lots, was duly rated and assessed thereon in the sum of £2 1s. 3d., for and in respect of said lots, and for the purpose in the said act act of parliament and by-law set forth : and the defendants further say, that at the said time when &c., and before the commencement of this suit, the plaintiff having neglected to pay the said sum of £2 1s. 3d. taxes imposed upon him as aforesaid, for the space of fourteen days after demand made upon him for the said taxes by the said defendant William Oakley, so being collector as aforesaid, he, the defendant William Oakley, as such collector, and the said William Y. Brunton as his bailiff, by authority of the said by-law so passed by the mayor, aldermen,

and commonalty of the city of London under the authority of the said act of parliament, seized, took and detained the said goods and chattels in the declaration mentioned in the said close in which, &c., and justly, &c., as and for, and in the name of a distress for the said sum of £2 1s. 3d., taxes so imposed and due by the plaintiff as aforesaid, and which said sum is still due and unpaid : and the defendants further say, that at the said time when, &c., and before the commencement of this suit, the said by-law was and still is in full force and effect, and in no way quashed, rescinded, vacated, or repealed ; wherefore the defendants pray judgment and a return of the said goods and chattels, &c.

Demurrer, on the following grounds—1. That the rate imposed by the by-law is a rate for the year 1858, imposed upon the assessment returns of the year 1857, whereas it ought to have been imposed as a rate in the year 1858, over and above and in addition to all other rates for that year rated on the assessment of that year.

2. That no by-law for imposing a rate for any given year can be passed but on the assessment of that year ; but by the by-law itself the rate was struck on the assessment of the year 1857 for the year 1858.

3. That the avowry does not shew that any by-law was ever passed authorising the sum of £63,000, or a special rate imposed per annum over and above and in addition to all other rates to be levied in each year, and over and above the interest to be payable on such debentures, which should be sufficient to form a sinking fund of two per cent. per annum for that purpose, or that the rate mentioned in the said avowry was imposed in the same manner as the rate to pay the said £63,000.

4. That it does not appear by the by-law that the rate of five shillings in the pound imposed is for the payment of the interest on the said sum of £11,400, or for a sinking fund of two per cent. per annum, or for that purpose, whereas the act only authorizes the imposition of a sum sufficient to form a sinking fund of two per cent. per annum in discharge of the said £11,400, over and above the interest.

5. That the rate imposed is not in conformity with the

statute, in this, that it is not a rate to pay interest on the said sum, and two per cent. per annum as a sinking fund, or a rate to pay the interest, or a rate to pay two per cent. as a sinking fund.

6. That it is not a rate over and above and in addition to all other rates to be levied in the year 1858, for it is levied before the assessment of the year 1858.

The following judgment was delivered in the court below :

SMALL, J.—This is an action of replevin against Oakley, the collector of the city of London, and Brunton, an auctioneer, for taking and detaining a single horse cutter, the property of the plaintiff, of the value of six pounds. For defence, Oakley well avows and Brunton well acknowledges the taking and detaining of the said goods, and justly, &c. The avowry then proceeds to set out so much of the act of the 19 & 20 Vic., ch. 97, as the defendants think will enable them to justify the taking. They then go on to state that on the eleventh day of January, 1858, the city council, according to the statute in that behalf, and in pursuance of the aforesaid in part recited act, duly made and passed a by-law to raise £11,400 to defray the cost of the construction of certain sewers by special assessment on the proprietors of such real property as referred to in the eighth section of the said act. They then set out the sewers intended, and aver that the sewers referred to in the said act and mentioned in in the by-law are the same, and that the by-law provides that the £11,400, being a portion of the cost of constructing the sewers, should be borne and paid according to the provisions of the said act (see eighth section), and that there should be raised annually for nineteen years £600 of special rate upon the proprietors, &c. They then aver that the amount of real property benefitted by the sewers is £29,508, *according to the assessment returns for the same* (without saying for what year) *and the said by-law*, and that the by-law enacted that the £600 should be levied, &c., annually for nineteen years by special rate, over and above all other rates whatsoever upon the proprietors, &c., and that the by-law requires the city clerk to deliver to

the collectors a roll, &c., with a special rate inserted thereon of five pence in the pound ; and that the by-law further enacts that it shall be the duty of the collectors to proceed according to law, and collect the sum of £600 for the year 1858. They then aver that the plaintiff, being the proprietor, &c., of the lot mentioned in the declaration, was duly rated and assessed by the city council, by virtue of the said act and the said by-law, for 1858, in the sum of £2 1s. 3d., for the purpose as in the act and by-law mentioned, and that afterwards the city clerk delivered to the defendant Oakley, he being a collector, a roll upon which the plaintiff was duly rated and assessed for £2 1s. 3d., for the purpose in the said act and by-law set forth ; and that the plaintiff having neglected to pay after notice and demand, the defendant Oakley, as collector, and Brunton as his bailiff, by the authority aforesaid, took and detained the said goods, &c., and justly, for and in the name of a distress, &c. ; and that the by-law was and is in full force and effect.

To this avowry Mr. Wilson demurs, and sets out six special causes of demurrer : first, that the rate imposed by the by-law is a rate for the year of our Lord 1858 imposed upon the assessment return of the year 1857, whereas it ought to have been imposed as a rate in the year 1858, over and above and in addition to, &c., for that year.

I can see nothing in the avowry to warrant the supposition that the rate was imposed upon the assessment returns for 1857. The avowry states that the by-law under which the defendants acted was passed on the 11th of January, 1858 ; and as far as the by-law is set out it is silent as to what assessment return the rate was imposed upon, and in the absence of anything to the contrary, I think I am bound to believe that what was done was done legally. The objection in the second cause of demurrer is similar in substance. The other four causes assigned appear to me to question the validity of the proceedings of the city council in passing the by-law as set forth in part. I do not think there is any power vested in the county court to pass judgment upon the validity of the proceedings and by-laws of the city council.

I am of opinion that a collector of taxes has only to look

to his roll and warrant for collecting, and that what is stated in the avowry, if true, is a good answer to the action. No authorities were cited on either side. Looking at the pleadings only, I am of opinion, as before stated, that the avowry is good in substance, and that judgment should be entered for the defendants. I have less hesitation in coming to this decision, as I have reason to believe that whichever way I decide there will be an appeal to a tribunal where the opinion of three judges can be had, which I think is of very great importance, as it was intimated upon the argument that a number of other actions of a similar nature are awaiting the decision of this.

From this judgment the plaintiff appealed.

J. Wilson, Q. C., for the demurer.

M. C. Cameron, contra.

ROBINSON, C. J.—The plaintiff has demurred, relying upon objections to the by-law which the pleadings do not bring under the view of the court. The plea is carefully framed. If there are such defects in the by-law it avoids exposing them, and only sets out what is necessary for authorising the making a rate to meet the £600 per annum for paying the £11,400 in nineteen years.

I think the judgment of the judge of the county court was right, and that the appeal must be dismissed, with costs.

BURNS, J.—I think the judge was right in giving judgment against the demurrer.

The plaintiff's argument, that the by-law is bad, is based on the proposition that upon the 11th of January, 1858, when it was passed, the assessed value of the property for the year 1858 was not then ascertained, and could not be under the assessment laws, and therefore the council must have taken the assessed value of the year 1857 upon which to base the calculation, and that this mode is not in accordance with the provisions of the assessment laws.

With regard to the special rate raised for the purpose of the sewers, that depends upon the 8th section of 19 & 20 Vic., ch. 97, and I do not think there was any necessity to

wait for a completion of the assessment of that year in order to fix a rate by an estimate, supposing that in all other cases of rates it is necessary to base a calculation upon the assessed value of the year in which the rate was intended to be levied. We see by this section of the act that the debt which the rate in this case was intended to provide for the payment of, had been incurred at the time of passing the act, 1st of July, 1856, to the extent of £16,000. It is recited also that it was the intention of the corporation that a considerable portion of the cost of the sewers should be raised by assessing the proprietors of the real property that might be immediately benefitted by the improvements, but that appears never to have been done, and the act empowers the aldermen, &c., to assess the proprietors of such real property as may abut upon any public street, &c., for such sum or sums yearly, in like manner as the corporation was empowered to impose assessments for the redemption of the whole amount of debentures authorised to be issued; and under the 5th section the corporation was authorised to impose a special rate per annum over and above and in addition to all other rates to be levied in each year, and over and above the interest to be payable on such debentures, as will be sufficient to form a sinking fund of two per cent. per annum for that purpose. Now the by-law shews that the sum of £11,400 of this debt was for the purpose of constructing certain of the sewers, and further it shews that the proprietors of the real estate benefitted by the improvement to the extent of £29,508, and upon this improvement the tax of five pence in the pound is rated. At the rate of paying £600 a year it would take nineteen years to levy the amount of £11,400, and at the rate of five pence in the pound upon the amount of the improvement it would be £614 15s. a year. This special rate, as I understand the meaning of the legislature in the 8th section of the act, had nothing to do with the variableness or variation of the value of the real estate from year to year, and upon which it would be necessary to base a calculation of what was required for the year. There was a debt then existing, a sum certain, and of this sum it appears it was the intention of the corporation to make the proprietors of the real estate benefitted

by the improvements bear a considerable portion, but it had never been done. The by-law compels the proprietors to pay £11,400 of the debt, and tells us that the property has benefitted to the extent of £29,508, and for that benefit they should pay five pence in the pound for nineteen years, beginning with the year 1858. I do not see what the assessed value of the real estate in any year has to do with that question. The corporation was authorised by the act of parliament, after the 1st of July, 1856, to assess a considerable portion of the £16,000 debt upon the proprietors benefitted by the sewer improvements. How much of it, is left uncertain by the act of parliament, but the by-law tells us they, the proprietors, have benefitted to the extent in value of their real estate, £29,508, and therefore the corporation fix the portion of the debt at £11,400, to be paid in manner provided for. If the portion to be paid be too much, or the mode of payment be not correct, this manner of contesting it will not do. The debt for the sewers formed part of the £63,000 authorised to be borrowed by the corporation, for which they were to form a sinking fund in the manner mentioned, and under the 8th section it remained for the corporation to fix the proportion of the debt the proprietors should pay, and then in a like manner they would be called upon to pay by assessment. If the proportion of the debt fixed to be paid, and based upon a proper calculation of the extent to which the proprietors have benefitted in the value, be correct, then the plaintiff has nothing to complain of that no interest is exacted from him. £600 a year for nineteen years just makes the amount of the debt, £11,400. This £600 a year it never could be contended must be invested, as the amount must be, to pay off the £63,000, for if so, then it would amount to a double investment of the amount to the extent of the whole debt, £11,400. The words, *in like manner*, mentioned in the 8th section, must mean that the assessment is to be imposed and collected as the other, that is to say, over and above all other rates that the proprietors are subjected to.

The appeal should, I think, be dismissed.

McLEAN, J., concurred.

Appeal dismissed.

17 U.C.Q.B.

TATE AND CLARKE V. THE PORT HOPE, LINDSAY AND
BEAVERTON RAILWAY COMPANY.

Agreement—Construction of—Condition precedent.

Declaration—That the plaintiffs agreed to complete the ballasting of a certain portion of defendants' railway, and to construct stone culverts and bridge abutments at certain points, and to do the grading necessary, &c., all to be completed before the 1st of January, 1859, provided the company should furnish cash to meet the monthly estimates of the engineer that the plaintiffs commenced, and were ready to complete the work, but defendants wrongfully prevented and discharged them.

Plea, that by the same agreement it was provided, that whereas the plaintiffs had leased said railway from defendants, by lease bearing even date with the agreement, in which it was provided that £30,000 should be expended by defendants on the completion of the road before the rents should be payable, and whereas defendants were unable to raise the £30,000, it was therefore agreed that the plaintiffs should work the road, free of any charge for the use of it, and should expend the surplus earnings on the completion thereof, the amount so expended to be taken as part of the £30,000: that the lease so made was for the express purpose of enabling the plaintiffs to work the road, and raising thereby enough to enable defendants to pay them for the work contracted to be done by them: that the plaintiffs, although they had the free use of the road, refused to work and abandoned the same, whereby they forfeited the contract, and defendants therefore prevented them from proceeding with the work, as they lawfully might.

Held, on demurrer, plea bad, the agreements being independent.

DECLARATION.—That whereas heretofore, to wit, on the 11th of December, 1857, by a certain agreement then made between the plaintiffs and the defendants, the plaintiffs agreed to complete the ballasting of the railway of the defendants, on that portion of the said railway which was at the date of the said agreement unfinished, and which was then approximately estimated at twenty-five miles, including station grounds and siding, and wherever it might from time to time be required, the said ballasting to be equivalent in quantity to that on the parts of the road then already ballasted—that is to say, in embankments and dry places six inches under the ties, and in wet cuttings one foot, if required by the engineer—the said ballast to be taken from the defendants' pits which were then in use, or from such as they might thereafter furnish. By the said agreement the plaintiffs also agreed to construct stone culverts and bridge abutments at the points in the said agreement mentioned, and of the dimensions in said agreement, stated, amounting in all, as stated in said agreement, to the approximate quantity of two thousand cubic yards, said structures to be built of lime stone of good quality, laid in water-lime mortar, on

foundations of flatted cedar or pine timber ten inches thick, planked with three-inch plank, and to be similar in quality and workmanship to the stone culverts and bridges then already built on the road. By the said agreement the plaintiffs also agreed to do the grading necessary to complete the embankments over the said culverts as the same were built, and to fill the trestle bridge across Cavan Creek swamp, to extend the embankments on each end of Gal-loway's bridge, to widen the embankments and bring them up to the true grade line, and finally, for whatever other purpose might from time to time be required, the quantity by said agreement being approximately estimated at eight thousand cubic yards, the plaintiffs to have the privilege of choosing where to obtain material, also to do such work as might be required in building new bridges, buildings, and sheds, fences and gates, cattle-guards, bog-drains and crossings, and in extending track on sidings and station grounds, and on the harbour ground at Port Hope, all of which said work and material was to be equal in quality and workmanship to similar work and material at the time of said agreement on the said railway, and to the constructing and completing of the same ; and for the purposes aforesaid should and would, at their own costs and charges, find and provide the best materials of every kind, and all mechanics' tools and workmen, and all cartage, scaffolding, tools, tackle, and other things whatsoever necessary, the whole to be in conformity with the specifications and descriptions therein-before recited, and with such directions and detailed plans and drawings as might from time to time be furnished by the chief engineer of the defendants for the guidance of the plaintiffs. The whole to be completed on or before the first day of January, 1859, (provided the company should furnish cash to meet the monthly estimates of the engineer, as in said agreement is covenanted and agreed,) and to the satisfaction and acceptance of the engineer, to be by him testified to the company by his certificate to that effect in writing; and in consideration of the said works covenanted and agreed to be constructed by the plaintiffs, the defendants agreed that they should and would pay or cause to be paid the rates

and prices specified in the tender annexed to the said agreement, and which it was agreed was to be taken as forming part of the said agreement, and which said prices were as follows, that is to say, &c. ; and although the plaintiffs have always from the time of making the said agreement performed and fulfilled the same on their part, and did afterwards, to wit, on the day and year first aforesaid, enter upon and commence the said work, and for that purpose did procure and find all materials and labour necessary for performing the same, and have always been ready and willing to perform and complete the whole of the said work in pursuance of the said agreement, yet the defendants did not nor would perform the said agreement, and did not nor would permit or suffer the plaintiffs to proceed to complete the said work, and then wholly hindered and prevented them from so doing, and then wrongfully discharged the plaintiffs from any further performance or completion of their said agreement, whereby the plaintiffs have lost and been deprived of the profits and advantages which they otherwise might and would have derived and acquired from the completion of the said works.

Plea.—The defendants say, that it was and is also provided in and by the said agreement, as follows : and whereas the plaintiffs had leased from the defendants the said railway from Port Hope to Lindsay, by lease bearing even date therewith, in which it was provided that the sum of £30,000 should be expended by the defendants on the completion and equipment of the said railway before the rents thereby reserved should be payable ; and whereas the defendants were then unable to raise the said £30,000, it was therefore agreed that the plaintiffs should in the meantime work the said road to the best advantage, and after deducting the expenses of working the same should expend the whole surplus net earnings thereof upon the ballasting and completion of the said road, so far as requisite and required by the engineer of the defendants, and that the amount so to be expended should be taken as part of the said £30,000 so to be expended as aforesaid, and for that purpose they should have the use of the road and rolling-

stock of the defendants free of charge, the same to be returned to the defendants in as good order as when received by the plaintiffs. And the plaintiffs as such lessees thereby agreed to keep true and faithful accounts of the receipts and expenditure of the said railroad during the above time in books to be kept for such purpose, so as to exhibit what the said net earnings were, and as often as should be reasonably required permit the defendants or their agent to inspect the same, and should not charge the defendants in such expenditure any costs or expense in carrying out the said proposed works for the conveyance of men or material, or for any other matter or thing whatsoever except the contract prices in the contract set forth and in the declaration mentioned, and should not during such time directly or indirectly make any charge for their own time, trouble, or personal outlay, considering themselves so far in the position of ordinary contractors ; and the defendants say, that they, the defendants, were at the time of the contract, and have ever since continued, unable to raise the said sum of £30,000, the said last mentioned sum including the whole of the money to have been paid to the plaintiffs for all their claims for work, materials, and all other matters and things whatsoever under the contract, and including also the whole of the money to have been laid out by the defendants in furnishing and equipping the said railway with rolling stock and all other materials necessary for the due and full use and working of the said line ; and that the lease so made to the plaintiffs was for the express purpose of the plaintiffs working the said road, and raising by the net earnings of the use and working thereof sufficient moneys wherewith the defendants might pay the plaintiffs for their work they had so contracted to do in the construction of the railway and works aforesaid ; and that the plaintiffs, after the making of the contract, and before the commencement of this suit, to wit, on the 1st of June, 1858, and from thence continually to and until the commencement of this suit, and although they had the use of the road and rolling stock of the defendants free of charge, neglected and refused to work the said road to the best

advantage, wherewith and whereby they could and might, after deducting the expenses of working the road, have expended the surplus net earnings thereof upon the ballasting and completion of the said road, and then also abandoned the working of the said road under the said lease, whereby the defendants afterwards and in consequence thereof hindered and prevented the plaintiffs from further proceeding with the said works in the declaration mentioned, as they the defendants lawfully might for the cause aforesaid.

Adam Wilson, Q. C., for the demurrer.

Cameron, Q. C., and *Galt*, contra.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiffs are entitled to judgment on their demurrer to the defendants' second plea. The agreement respecting the working of the road by the plaintiffs was not in the nature of a condition precedent, in relation to the contract for doing the work, so that the plaintiffs by failing to work the road could lose their remedy upon the contract by which they were employed to do the unfinished work upon the road.

We do not concur in what is assumed by the plaintiffs, that either party was at liberty to withdraw at their pleasure from the arrangement for working the road ; but, on the other hand, the fact that the plaintiffs did withdraw from it, or refuse or neglect to go on with it, does not disable them from suing the defendants for refusing to let them go on with the construction of the road under the contract for that purpose. The two things had no such intimate connexion with each other by the language of the agreement.

It is possible that the defendants may have reckoned upon receiving such profits upon the working of the road as would give them the means of meeting the monthly estimates of the work to be done by the plaintiffs, but if they did so reckon, all that can be said is that the result has shewn their calculation to have been imprudent. They ventured to engage absolutely to pay for the work as fast as the plaintiffs

should perform it, month by month, upon the engineer's estimate.

The plaintiffs were at liberty to go on with the work as fast as they pleased, and were bound to have it done on the 1st of January, 1859, about a year after the contract was entered into, and it can hardly be supposed that either party anticipated that the net profits on working the portion of the road to be leased would enable the defendants to pay for the work, especially as the £30,000 was to be expended on the road before any rent could commence. The two agreements were clearly independent. If the plaintiffs failed in regard to their agreement to work the road, the defendants have such remedy as the agreement will give them; but that is a matter separate from the plaintiffs' claim under the agreement upon which they are suing, though both stipulations happen to be contained in one instrument.

Judgment for the plaintiffs on demurrer.

CULLODEN V. McDOWELL.

Execution from a division court do not bind the property before they are placed in the bailiff's hands; and, *quære*, whether before an actual seizure. A chattel mortgage, executed before the 20 Vic., ch. 3, does not require re-filing.

APPEAL from the county court of the county of Halton. This was an action for the conversion of the plaintiff's goods.

The jury found for defendant, and a new trial having been refused, the plaintiff appealed.

The facts of the case, so far as they are essential to the understanding of the points decided, are sufficiently stated in the judgment.

D. B. Read, for the appeal.

Morphy, contra.

ROBINSON, C. J., delivered the judgment of the court.

We regret to find ourselves bound, as we think we are, to grant a new trial in this case, for the value of the property in litigation is small; and if the question of granting a new trial had turned in the court below upon the judge's opinion of weight of evidence when there was conflicting testimony,

it is not likely that we should have overruled his decision. But unfortunately it appears, upon a comparison of the judgment given below with the evidence, that the judgment was founded upon a misconception of the facts in two essential particulars. The learned judge first assumed that it had been proved that the execution from the division court came to the bailiff before the assignment had been made under which the plaintiff claims. I did not notice the discrepancy between the judgment given below and the evidence in this respect, till one of my brother judges pointed it out to me.

According to the bailiff's evidence, he did not receive the executions till the 2nd of March, but the mortgage under which the plaintiff claims was made on the 2nd of February. The writ indeed had issued in *January*, but that did not signify. It could not bind the property before it came to the bailiff's hands, if indeed it could before an actual seizure was made under it, for it is not to be assumed that an execution from an inferior court binds from the time of its delivery to the bailiff.

Then, again, the judge seems to have thought that the plaintiff had lost the benefit of the mortgage by not re-filing it within thirty days next before the end of a year from the first filing. Now the 8th section of the act 20 Vic., ch. 3, does not apply to mortgages executed before that act (*a*), and the 14th clause repeals the former acts, and it seems doubtful whether it allows of any thing further being done under them.

We are of opinion that the judgment given below should be reversed, and a new trial granted, without costs.

Appeal allowed.

During this term the following gentlemen were called to the bar: ROBERT O'HARA, CHARLES PATRICK MCGIVERN, FRANCIS MCKELCAN, DAVID TISDALE, WALTER ROSS MACDONALD, JAMES DUNN, HENRY DUNBAR REYNOLDS, MARCELLUS CROMBIE, RICHARD BARRETT BERNARD.

(*a*) The mortgage in this case was dated 2nd of February, 1857.

HILARY TERM, 22 VICTORIA, 1859.

Present:

THE HON. SIR JOHN BEVERLEY ROBINSON, BART., C. J.

“ ARCHIBALD MCLEAN, J.

“ ROBERT EASTON BURNS, J.

STERLING V. MCEWAN.

Assignment of debt—Attachment—Right of action by assignee.

K. owned a propeller which had been employed by government, for whom S. was acting as agent. He sold her to the plaintiff, and addressed the following letter to S. :

“DEAR SIR,—As owner of the Pro. ‘S. C. Ives,’ now employed by you on account of the Canadian government in conveying materials to Point au Pelé light house, I beg to inform you that I have this day conveyed to E. J. Sterling, Esq., of Cleveland, all my right to the payment of moneys for services performed by said boat under our contract. You will therefore after presentation of this, account to him or his agent for such sums as said boat may be entitled to on account of work performed under our contract.”

At the foot of this was an order, signed by the plaintiff, to pay the money to the captain of the vessel.

This money was afterwards seized by the sheriff under an attachment against K., which was subsequently set aside. Whether it was so seized in the hands of S. or of the captain of the vessel did not appear.

Held, (McLean, J., dissenting,) that the plaintiff might maintain an action against the sheriff for the money in his own name.

This was an action against the defendant for money had and received.

Plea.—Never indebted.

The facts, as they appeared at the trial, at Sandwich, before *Burns*, J., were these :

The defendant was sheriff of Essex, and on the 24th of November, 1857, a sum of \$600 came into his hands from one of his bailiffs, as seized and obtained upon a writ of attachment issued against all the estate real and personal of one John Kynock. A vessel had also been seized as belonging to Kynock, and his money was due to the vessel on account of her earnings from a Mr. Scott, employed by the government in the erection of Point au Pele light house on lake Erie. Whether this money had been paid over by

Mr. Scott direct to the bailiff as upon the attachment, or whether Mr. Scott had paid it over to the captain of the vessel, and the bailiff had seized it in his hands, did not appear. The attachment was afterwards, on the 2nd of January, 1858, set aside, whether upon the ground that Kynock was not a resident of this country, or for what cause, did not appear. The vessel was restored, or rather possession of her by the sheriff abandoned. The money still remained in the hands of the sheriff, and he declined giving it up, at the instigation of some of the creditors of Kynock, who indemnified him for resisting a suit in the name of this plaintiff. A bill of sale of the schooner or vessel was proved, made on the 1st of September, 1857, from Kynock to the plaintiff. She appeared to have been an American vessel, and the plaintiff was described as of Cleveland, in Ohio, and Kynock as of Buffalo, in the state of New York,

To entitle the plaintiff to be treated as the owner of the money in question a letter was put in, signed by Kynock, and addressed to Mr. Scott. Scott had possession of this letter, and gave it to the plaintiff's solicitor for the purpose of this suit. The letter was as follows :

"BUFFALO, *August 20*, 1857.

"CAPT. SCOTT,

"Dear Sir,—As owner of the Pro. 'S. C. Ives,' now employed by you on account of the Canadian government in carrying materials to Point au Pele light house, I beg to inform you that I have this day conveyed to E. J. Sterling, Esq., of Cleveland, all my right to the payment of moneys for services performed by said boat under our contract. You will therefore, after presentation of this, account to him or to his agent for such sums as said boat may be entitled to on account of work performed under our contract.

Yours respectfully,

(Signed), JOHN KYNOCK."

Underneath was an order signed by Sterling, to pay the money to one Humphries, the captain of the vessel.

The defendant contended there was no sufficient transfer of the money to the plaintiff to enable him to sue for it, and that no one could claim it at the hands of the sheriff but Kynock, or at least it must be done in Kynock's name.

A verdict was taken for the plaintiff, subject to the opinion of the court.

C. Robinson for the plaintiff.

Prince, for the defendant, cited *Storey on Contracts I.*, 443, note I.

ROBINSON, C. J.—I should infer from Kynock's letter to Scott being in Scott's possession, and produced by him with an order at the foot of it signed by Stirling, to give the money to Humphries, the captain of the vessel, that it was from Humphries probably, and not from Scott, that the money was obtained by the sheriff or his officer under the attachment. How that was did not appear upon the trial.

If Scott had paid over the money to Humphries upon Sterling's order, which had been given to him, that would have shewn very clearly that Scott had accepted the order, and appropriated the money to Sterling out of the public moneys placed in Scott's hands to defray the cost of erecting the light house. But whether Scott had accepted the order or not, though it might have been material if an action of this kind had been brought by Sterling against Scott, is not a question that arises in this action, for assuming that the sheriff, hearing that Scott held certain money for Kynock in his hands, went to him with the attachment, and applied for the money, we must conclude that Scott found and admitted that he had in his hands a certain sum which Kynock had a right to claim from him, and therefore paid it over to the sheriff, notwithstanding he held in his hands a letter from Kynock, informing him that the money belonged to Sterling, to whom Kynock desired that it should be paid over.

The sheriff, whatever may have been told him by Scott, held the money, thus obtained upon an attachment against the goods, &c., of Kynock, and that attachment being afterwards set aside, he is sued by Sterling in this action for the money. Kynock is not claiming it, and I think there is no difference between this case and what would have been the case if the sheriff had attached some chattel in Scott's hands, assuming it to belong to Kynock, and if, the attachment being afterwards set aside, a claim had been made

upon him by a person who contended that the chattel belonged to him, and was not in fact the property of Kynock when it was attached.

The question is not merely whether the sheriff would not be safe in disregarding the claim of such third party, and in returning the money that had been attached to Scott, from whom he received it, or in handing it over to Kynock ; but whether, if it can be proved that the chattel or money which he had taken was in fact the property of the party claiming it as his, he would not be safe in handing it over to the true owner ; and whether, if he refused to do it, he would not be liable to such true owner.

This is not the common case of a man giving an order upon his agent, or other person, in favour of some third party against the person on whom the order was drawn, until he had accepted the order. So if, instead of being a draft or bill, it was the cause of a letter written, authorising or directing the person to whom it was addressed to make a payment to the person presenting it, until the person to whom the letter was written had assented to make the payment he could not be held liable in an action for money had and received as for so much money held by him to the use of the person to whom he had been desired to pay it.

This is no case of that kind, nor is it, as it seems to me, an assignment of a chose in action. The letter written by Kynock proves that he had sold to Sterling not only the vessel but what money she had earned in transporting stone for the light house : that, in other words, the money which Scott had held in his hands for Kynock had become Sterling's money by an arrangement made between him and Sterling, and so that Scott was to pay it to Sterling, and not reserve it for Kynock. He informs Scott by his letter that he had made over the money to Sterling, and that it was his. If the jury were satisfied, upon production and proof of Kynock's letter, that the fact was so, I do not see what right any third party can have to suggest a doubt, or interpose a difficulty, in order to prevent the money going into Sterling's hands.

For all that appears, Kynock had a perfect right to assign

the money in Scott's hands to Sterling, as he said he did ; and Scott is making no objection on any ground. By parting with the money he shewed that *he* made no claim to it ; and the question is thus reduced to this, does the money belong to Kynock (who does not claim it), or to Sterling, to whom Kynock has declared in writing he had transferred it? Could Kynock support an action for it against Sterling, or against Scott, or the sheriff, in the face of his own declaration that the money was no longer his, but belonged to Sterling? I think it is clear he could not, for it is a reasonable inference from Kynock's letter that he had in a transaction of business, for a valuable consideration, transferred to the plaintiff along with the vessel the money which she had earned, and which was lying in Scott's hands for him. The direction from Kynock to Scott to pay over to Sterling whatever money he had in his hands, being the earnings of the boat, was not like a common order, for it was accompanied with a written declaration that in consequence of arrangements that had taken place it belonged to Sterling ; and when once Scott had set apart the money which he held for Kynock, as he did by placing it in the sheriff's hands as the money that had accrued from the earnings of the boat, I think Sterling could make good his claim to it in a court of law as well as he could to any article of furniture that had belonged to the vessel, and which Kynock had left in Scott's hands, and had afterwards transferred with the vessel to Sterling. Otherwise this would be the absurd state of things. The money is in the sheriff's hands, who had never any further claim to meddle with it than that he had seized it under an attachment, which has been since set aside. Scott pretends no claim to the money, and has shewn that clearly enough by his conduct in handing it over to the sheriff, and Kynock has left the country, and if he were here he could not sue for it, in the face of his own declaration that it belongs to Sterling.

I refer to *Israel v. Douglas* (1 H. Bl. 239) as in support of this action.

In my opinion the verdict for the plaintiff should not be set aside, and the rule should be discharged.

MCLEAN, J.—This action was tried before Mr. Justice *Burns*, at the last assizes at Sandwich, and a verdict was taken for the plaintiff, and £157 10s. damages, subject to the opinion of the court. By the plaintiff's particulars, attached to the record, it appears the action is brought to recover a sum of £150 and interest, being a sum of money belonging to the plaintiff received by the defendant from one William Scott, or from one — Humphries, in the latter part of the year 1857. It appeared in evidence that one John Kynock was the owner of three-fourth parts of a steam propeller tug, called the "S. C. Ives," which vessel was engaged in the service of the government in carrying materials for the erection of the Pointe au Pele light house, under the direction of a Mr. Scott, as engineer. The propeller was under the command of a person of the name of Humphries as master. On the 20th of August, 1857, Kynock wrote to Mr. Scott, the engineer, addressing him as Captain Scott, stating that as owner of the propeller "S. C. Ives," then employed by Scott on account of the Canadian government in carrying materials to Pointe au Pele light house, he had that day conveyed to E. J. Sterling of Cleveland all *his right* to the payment of moneys for services performed by said boat under their contract, and desiring Scott, after the presentation of that letter, to account to him or his agent for such sums as the boat might be entitled to on account of work performed under their contract; and under that letter was an order to pay any and all funds due for services of propeller "S. C. Ives" to Captain Humphries, signed E. J. Sterling, and dated Malden, August 22nd, 1857. *When* that authority to pay over the money earned by the propeller was received by Mr. Scott, or whether Humphries ever presented it or called for the amount, or whether any account was rendered to Mr. Scott before the money was attached, does not appear. All that is known is, that the letter of Kynock, announcing the assignment to the plaintiff of the earnings of the propeller, and the plaintiff's authority to Scott to pay the amount, whatever it might be, to Humphries, were produced at the trial, and were said to have been furnished by Mr. Scott to the

plaintiff's attorney. An assignment was also produced at the trial, bearing date on the 1st of September, 1857, executed by Kynock to the plaintiff for three-fourth parts undivided of the propeller "S. C. Ives." Upon this evidence the plaintiff claimed a verdict for \$600, the amount received by defendant under an attachment against Kynock at the suit of Thomas Salmoni, which attachment was set aside by an order of Mr. Justice *Hagarty*, in Chambers, with costs, on the 4th of January, 1858, but restricting Kynock from bringing any action, from which it may be inferred that it was set aside for some irregularity.

On this evidence a verdict was taken for the plaintiff, subject to the opinion of the court, and the plaintiff now contends that he is entitled to the judgment of the court in his favour, but I am as yet unable to perceive that the money has in fact become the plaintiff's. If any particular chattel had been assigned as the propeller was, it would undoubtedly pass to the plaintiff, and no subsequent attachment could affect it; but money not set apart in any way, or specifically recognised to belong to Kynock, could not pass until Mr. Scott had accepted the order for payment. Until that order was presented and accepted the money in Scott's hands continued to belong to Kynock, and he could control it, and direct it to be paid to any one else. Without some evidence to shew that the order of Kynock was presented to Scott before the money was attached in his hands, or paid over to defendant, I cannot see how the plaintiff can be entitled to sue as for money received by defendant to his use. From the fact of the letter of Kynock being handed over by Mr. Scott to the plaintiff's attorney before the trial, a strong presumption arises that Mr. Scott's testimony could easily have been procured if it could have been of any service to the plaintiff; and from his not having been produced as a witness, and his having paid over the money on the attachment to the defendant, the further presumption arises that he could not have accepted the defendant's order, or acted in any way upon it before the money was so paid. If it had been paid to Humphries it could not have come into the defendant's hands, because in such case it would have been received as

the money of the plaintiff, and it is not probable that it would be given up on an attachment against Kynock. It is, I think, obvious that Mr. Scott must have considered the money to be Kynock's, when he paid it over as belonging to him. If so paid over, and there is nothing to shew the contrary, before Kynock's letter was received by Mr. Scott, then the mere possession of an order on Scott for the amount could not transfer the money or enable the plaintiff to sue defendant for it as money received to his use. The evidence is too imperfect to establish a right in the plaintiff; but perhaps on another trial he may be able to shew more conclusively that he was entitled to the money at the time it was paid over. I have no objection to grant a new trial, with costs to abide the event, or on payment of costs; but on the testimony given on the last trial I am of opinion that the plaintiff is not entitled to recover.

BURNS, J.—The first question is, what were the plaintiff's rights with respect to the money before it was paid over to the defendant's bailiff, and while it yet remained in Scott's hands. The letter from Kynock to the plaintiff is a complete transfer of the amount of the then earnings of the vessel. If it had been earnings *to become due*, according to the case of *Leslie v. Guthrie* (1 Bing. N. C. 697), a transfer would have been good, and would be enforceable in equity. At law the plaintiff could not in his own name have sued Scott for want of his assent to the transfer, but in equity the plaintiff could have sued him for an account, and for payment of the amount due; the rule in equity being that the assent of the debtor is not required, as it is at law, in order to make the transfer of the debt perfect. Scott had possession of the letter of assignment of the debt when the defendant came with the attachment, and he admitted that \$600 was due on the contract he had chartering the vessel, but as the attachment came he paid the money to the sheriff, who took it no doubt as Kynock's money. Scott is discharged by his payment of the money. He has by his payment admitted his liability to account, and has discharged the demand. According to the case already cited the attachment could not have held the money

from the assignee, and the assignment would have been a good answer for Scott to have made to any demand upon him under the attachment, to have shewn that the debt had already been assigned. However, he did not resist; but admitting there was so much due paid it, and, as I suppose, leaving it to other parties to litigate to whom it belonged. When he paid it to the sheriff, it could not have been paid as Kynock's money, for it had then been assigned to the plaintiff, and in equity was his money. The sheriff no doubt took it as Kynock's money, but in equity it was not Kynock's money. The attachment afterwards was got rid of, so that any legal claim by any other person than Kynock or the plaintiff is at an end. I see no reason whatever for supposing that Scott can sue the sheriff to recover the money back. Kynock has parted with all claim in equity to it, and I see no reason why the plaintiff must retort to an action in Kynock's name to recover it, treating the letter of assignment as a power of attorney only for that purpose. I think the payment by Scott, no matter to whom he gave the money, was an acknowledgment of so much due from him, and it then became the plaintiff's money both legally and equitably when the attachment was removed. Equitably it always was his, and I think it became legally so as soon as Scott set it apart by paying the money as the amount due on Kynock's contract.

Judgment for plaintiff—*McLean*, J., dissenting. (a)

DANIEL V. FITZELL ET AL.

Attachment—Absconding debtors—Service out of the jurisdiction—Priority.

A. having a claim against an absconding debtor, sued out a writ of summons against him as residing out of the jurisdiction, served the writ on him in the state of New York on the same day that an attachment issued against him here, and obtained judgment and execution before the first attaching creditor.

Held, that to entitle him to priority he must also show that his writ was served before the attachment issued, and no evidence being given to shew at what time of the day either event took place, that the attaching creditor's claim must prevail.

Quære, whether a service out of the jurisdiction would be sufficient, even if made before the attachment issued.

C. *Robinson*, obtained a rule upon William Glass to shew

(a) This case has since been carried into the Court of Appeal, where it has been argued and stands for judgment.

cause why the final judgment signed in a cause of the said William Glass against these defendants, Fitzell and Lister, and the *fi. fa.* issued thereon, and all proceedings under it, should not be set aside ; or why the claim of the said Glass under the *fi. fa.* should not be postponed to the claims of the plaintiff Daniel, and the other attaching creditors of these defendants, absconding debtors ; or why the money levied under the *fi. fa.* should not be retained by the coroners to whom the writ was directed, and distributed rateably among the creditors of these defendants ; or why the said money, if paid over to Glass, who is sheriff of the county of Middlesex, should not be retained, and hereinafter so distributed by him as such sheriff—on the ground that the process in the suit of Glass against these defendants was not served or executed before the suing out a writ of attachment in this cause against the defendants : or on the ground that the said action was brought by Glass in collusion with the said absconding debtors.

William Glass, on the third of July, 1858, sued out a summons against these defendants as British subjects residing out of the jurisdiction of this court, to recover \$1,600, and interest, upon a promissory note made by Fitzell and indorsed by Lister, and afterwards indorsed by Glass, and which he was obliged to take up.

On the 6th of July, 1858, (it was not stated at or about what time of that day,) the plaintiff's attorney in that suit served a copy of the summons on each of the defendants in the state of New York.

After the issuing of the summons a number of attachments were issued against these defendants as absconding debtors, the first of which was issued on the 6th of July, the same day that the summons in Glass's suit was served, according to the affidavit of the plaintiff's attorney ; but whether before or after such summons was served had not been ascertained, because it was not known at what hour of the 6th of July the said summons was served in the state of New York.

On the 13th of October the defendants caused an appearance to be entered for them in Glass's suit by an attorney.

On the 14th of October, a declaration was served in that suit, and on the 26th of October judgment was signed for want of a plea, and a *fi. fa.* issued to the coroner, Glass being sheriff of the county of Middlesex, and it was placed in his hands.

The plaintiff's attorney, Mr. Flock, made an affidavit that Glass's action was not brought in collusion with the defendants, or for the purpose of defeating their other creditors.

The defendants' attorney, Mr. Horton, who had appeared for them, had also filed a plea to the declaration, but afterwards on the same day withdrew it, on receiving from Mr. Flock, the plaintiff's attorney, an order in writing, signed by Fitzell, one of the defendants, directing him to make no defence, but to allow judgment to go by default, which was accordingly entered on the 26th of October, for \$1,639.12, besides costs.

It was sworn that after the declaration was served upon the plaintiff's attorney he went immediately to the United States, and obtained and brought back the written order from the defendant Fitzell to make no defence.

Glass, the plaintiff, swore positively that the debt for which he obtained judgment was justly due to him, and that his action was not brought by him in collusion with the defendants or either of them, nor for any fraudulent purpose whatsoever, but merely with the desire to collect the debt due to him. He swore that he was an accommodation indorser, but not that he paid the money.

Mr. Flock, the plaintiff's attorney, in a second affidavit, swore that he did, on the 6th of July, personally serve each of the defendants with a true copy of the process in Glass's case, but he did not state at what time on that day he made such services. He also denied collusion with the defendants, and he swore that judgment was entered, and execution placed in the hands of one of the coroners, before judgment was entered in any of the suits commenced by attachment.

In Glass's suit no proof was given upon a trial of the debt, as is required in cases against absconding debtors, it being assumed to be unnecessary, as the defendants were

personally served, though out of the province, and after they had absconded.

In this suit, of James Daniel against Fitzell and Lister, commenced by attachment, judgment was entered on the 2nd of February, 1859, and execution placed the next day in the sheriff's hands.

It was sworn that Fitzell, a few days before he absconded, went to Toronto, where he remained concealed till he had executed an assignment of his effects to trustees, which he did on the 29th of June, 1858, and immediately after absconded from the province. The attachment against his goods, which issued at the suit of the plaintiff, James Daniel, was taken out on the 6th of July, 1858, and placed on the same day in the hands of the sheriff. On the 13th of December, 1858, an attachment was issued at the suit of Caird and William Lister against Fitzell alone, as an absconding debtor, for \$11,901, and placed on the same day in the sheriff's hands.

Burns shewed cause.

C. Robinson supported the rule, citing *Gamble v. Jarvis*, 5 O. S., 272; Har. C. L. P. A., sec. 55, note s; Tay. Ev. 143; 22 Vic., ch. 96, secs. 18, 19.

The case of *Caird et al. v. Fitzell* (2 P. R. 262), was referred to in the argument, as being connected with the facts which had given rise to this application.

ROBINSON, C. J.—Glass having had the defendants Fitzell and Lister personally served with process in the United States after they had absconded, obtained judgment, and sued out execution before any of the attaching creditors. He was enabled to do this by the defendant's having, evidently by concert with the plaintiff's attorney, entered appearance and afterwards allowed judgment to go by default, directing the attorney to withdraw a plea which he had put in to the action. It cannot be said that there was any thing fraudulent in that on the defendants' part, for if they had no defence which they could set up they cannot be held to have acted fraudulently in not attempting

a defence. Glass's demand upon them was one of a simple character; his action was upon a note which he had indorsed for them and had to pay. It is not disputed indeed that his demand was a just one.

Still we can see what a door is open to fraud under the provisions in our Common Law Procedure Act respecting absconding debtors. It perhaps was not meant by the legislature that a plaintiff should have the benefit of the provisions contained in the 55th clause of the Common Law Procedure Act of 1856, by reason of his having served his process upon the debtor personally, unless he not only sued out his process before the debtor left this country, but also had it served upon him personally *in this province*, before the suing out of the attachment. But the provision is not so restricted, and we can see from the facts of this case how easy it will be, as long as the law respecting absconding debtors remains as it is, for the absconding debtor to defeat all the proceedings of attachment creditors by procuring himself to be served with process at the suit of some one or more friends, either just as he is on the eve of absconding, or before the fact of his having absconded can have become known, and any attachment be sued out against him. The action in which he has been served with process may or may not have been brought for a just debt really due. If fraud can in that respect be shewn, his attempt would fail. The act does provide for that, but it is no difficult matter to get up a fictitious cause of action, and not always easy to detect the fraud. Where this cannot be done, the absconding debtor, in order to let the favourite creditor sweep off all his assets, and so disappoint all the attaching creditors, has only to allow judgment to go by default, as has been done in this case for the express purpose of enabling the favoured creditor to obtain execution before any of the attaching creditors can possibly do so.

But whether the law should or should not be suffered to continue upon this footing, must be considered in other quarters. We can only draw attention to the effect of the statute in this respect as it now stands; and I take the effect to be, in such cases as the present, that the creditor who has served the absconding debtor in a foreign country,

even after he has absconded, may, as I apprehend at present, (though the point may require further consideration) obtain priority over the attaching creditors, under the 55th clause. But then it is clear that the plaintiff claiming such priority by reason of having had the process personally served upon the defendant, must make out that his process was served before the first attachment *was sued out*, and also that the execution was sued out before any attaching creditor has obtained execution.

In this case there is no doubt that Glass's execution was prior, but whether his process had or had not been served before the suing out of any attachment against the same defendants is not made out, further than that we see that both acts were done on the same day.

The attachment may be supposed to have been sued out within office hours of the 6th of July. Glass's summons was served on that same day upon the defendants in the state of New York. At what hour it was served the attaching creditors, who live in this country, cannot be expected to know, but the attorney of Mr. Glass, who seemed to have no difficulty in finding the absconding debtors in a foreign country, served the process upon them himself, and must therefore be well able to state at what time of the day he served it. He has made two affidavits in answer to this rule, but has made no statement upon that point in either of them. He can hardly be supposed to be ignorant that it is essential to his client's claim to priority to prove that the service of this process was made before any attachment was sued out.

The attaching creditors may well insist that till he has shewn this he has shewn no claim to be preferred to them, but at least could only share rateably, if the statute had made any provisions for a plaintiff who is not an attaching creditor sharing rateably with those who are. As the Act stands it seems that the creditor who has served his process personally, and who has made no use of the provisions of the Absconding Debtor's Law, either gains priority over all the attaching creditors, or must give way to them altogether. The 57th clause, which provides for distribution of absconding debtors' effects, can be applied to none but attaching creditors. The debtor's goods having been seized under

the attachment were in the custody of the law for the purpose of distribution rataebly among all the attaching creditors ; and it is incumbent on any one who claims a priority over them all to shew his right to it.

It appears to me, therefore, that the rule should be made absolute for the money levied to be retained by the coroners to whom the writ of *fi. fa.* was directed, and distributed rateably among the creditors who have sued out attachments, and that if the money shall have been paid over to Glass, who is now sheriff of the county of Middlesex, it shall be distributed by him according to the statute.

BURNS, J.—This application seems to grow out of what I said in the application made in *Caird v. Fitzell*, 2 P. R. 262.

The provisions of the 55th clause of the Common Law Procedure Act, 1856, are similar to those of 5 Wm. IV., ch. 5, sec. 4. Previous to the last mentioned act it had been held, as between two attaching creditors, that the one who caused the first attachment to issue would take the property, although the latter had obtained judgment and execution first—*Gamble v. Jarvis*, 5 O. S. 272 ;—the attachment in which case must have been before the statute passed, for the sixth section enacts that the attaching creditors shall share rateably. The case seems to shew that the seizure under the attachment was considered as placing the goods *in custodia legis*, and that the *fi. fa.* in the other case could not take them. This subject was discharged in the case of *Brown v. Francis* (11 U. C. R. 558), as between an execution obtained from the superior court and an attachment from the division court. The 56 section of the Common Law Procedure Act, 1856, provides for such cases now.

As the service of the writ of summons in Glass's action was upon the same day that the writ of attachment issued, the question is upon whom the burthen of proof rests to shew the priority. It is a fact that on the attachment the goods were seized and in the custody of the sheriff, and it is another fact that it is not for some time afterwards that Glass's execution comes out. It is therefore Glass who

claims on his writ the priority, for the other already has the goods *in custodia legis*. It seems to me the argument of Mr. Robinson, that the burthen of proof lies upon Glass to shew that his process, was served or executed before the attachment, is sound. The fact of the legislature making this provision must be taken to be an exposition of the law that without it the attachment would hold the goods in preference to the *fi fa*. This is a privilege conferred upon the execution creditor, and therefore it is incumbent upon him to prove the facts which entitle him to this privilege. The mere fact of having a judgment and execution will not do ; in addition to that, it is necessary he should have served or executed his process before the suing out of the attachment. The writ of summons, it appears, was issued on the 3rd of July, three days before the service of it, and before the attachment issued ; but that fact the legislature has not made of any avail ; it must be the service of it which is to deprive the attaching creditor of his priority in claiming the goods. Neither party shews the time of the day that either act was done, but each rests upon the proposition that it is the duty of the other to give the information. Now taking that point in the abstract, I must say I entertain no doubt that the information should come from the person who is seeking to take the goods out of the custody of the law, where they are for one purpose, in order to put them again into the custody of the law for another purpose.

There is no reason, I think, for interfering with Glass's judgment, or for setting aside his execution, but the sheriff will have to follow the provisions of the 57th section with respect to attaching creditors.

I have given this opinion without reference to the fact that service of Glass's summons took place out of the jurisdiction, and it may be very questionable whether the legislature contemplated a service out of the jurisdiction having the effect of cutting out an attachment sued out against the property in this province. If such service will cut out an attachment one cannot but see that that it may give rise to a great deal of fraud.

MCLEAN, J., concurred.

Rule absolute.

MCDONALD ET AL. V. McMILLAN.

Principal and agent—Representation as to authority to bind corporation—Want of corporate seal—Evidence.

An agreement was made between the plaintiffs, of the one part, and "The Great Western Railway Company, by their agent," of the other part, by which the plaintiffs contracted to furnish a large quantity of cordwood on the terms specified. The agreement was signed and sealed by the plaintiffs, and by defendant styling himself "agent." No representation as to authority was shewn to have been made by defendant, but it was proved that after the company had accepted and paid for a portion of the wood they refused to carry out the contract, and defeated the plaintiffs in an action brought upon it by setting up the want of their corporate seal.

Held, that this evidence was insufficient to sustain an action against defendant for falsely representing to the plaintiffs that he had authority to bind the company.

The declaration contained two counts. The second was abandoned.

The first count stated that the defendant, on the 29th of January, 1855, and before, &c., represented to the plaintiffs that he had full power and authority from the Great Western Railway Company to purchase from the plaintiffs for the use of the company 60,000 cords of wood, and to contract and agree with the plaintiffs as such agent, and professing to have such power and authority did contract and agree with the plaintiffs for the purchase of the said 60,000 cords of wood, in manner and on the terms following, that is to say, the said plaintiffs, and in the said agreement described as the party of the first part, for the consideration thereafter set forth, did covenant and agree with the Great Western Railway Company to furnish and deliver upon the premises of the said company, between Thamesville Bridge and Lobo station, in no case not more than three feet below the track, in such place as should be directed by the said company or their agent, 60,000 cords of wood, conformably to specifications of the same thereto annexed and signed by the plaintiffs, and forming a part of the said contract, 2,000 cords of the said 60,000 cords to be delivered annually at Ekfrid station, 2,000 cords at the Wardsville station, and 1,500 cords at Lobo station; that the said company thereby covenanted and agreed with the plaintiffs to pay at the rate of 11s. 3d. currency per cord for all delivered at the above named stations, and 10s. currency per cord for all delivered

on the side of the track in other places, the same to be paid for on the delivery of each 500 cords monthly, and ten per cent. to be retained until the said contract should be completed, and the balance to be paid when the whole amount contracted for was delivered and certified by the agent for the said company to be in strict accordance with the specifications thereto attached and signed by the plaintiffs, the whole 60,000 cords to be delivered on or before the 1st of January, 1860, at the rate of and not less than 10,000 cords per annum; that it was thereby also understood that the said plaintiffs might increase the quantity if they should wish; that the specification was annexed, and to the following effect (set forth). The plaintiffs then alleged that the said agreement was made by them and the defendant, and that they, relying upon the said representation of the defendant, went to large expenses, to wit, to £2,000, in preparing to perform their said contract, and were ready and willing to perform their said contract, and to deliver the said wood in accordance therewith, and gave notice thereof to the said company and the defendant, yet that the defendant falsely represented his said authority to the plaintiffs, and in truth and in fact he had no authority from the Great Western Railway Company to make the said contract with the plaintiffs, as the defendant well knew, and the said Great Western Railway Company would not accept or recognise the said contract, to the damage and injury of the plaintiffs.

The defendant pleaded not guilty, with other pleas not material to consider.

At the trial, at London, before *Burns, J.*, the plaintiffs relied on the following proof to sustain the declaration. They put in an agreement headed and commenced thus: "Memorandum of agreement made and concluded this 29th of January, 1855, by and between A. P. McDonald and Randolph Ross, of the city of Hamilton, of the first part, and the Great Western Railway Company, by their agent, of the second part, in which it is covenanted and agreed, &c." The agreement concluded thus: "In witness whereof we have hereto set our hands, on the day and year first above

written. RANDOLPH ROSS, A. P. McDONALD, W. McMILLAN, agent."

The defendant's signature to this document was proved. The plaintiffs then proved that a suit was brought by the plaintiffs upon this contract against the Great Western Railway Company, which failed except for the wood delivered and measured and accepted by the company. There were delivered and accepted 35,842 cords, and all that was paid for, except £3,000, the amount recovered in the action brought against the company. Evidence was given of wood delivered along the line of railway and near stations, which the company refused to receive or pay for. Then the plaintiffs gave evidence that the reason why they were not allowed to recover in the action brought against the company except for the wood actually delivered and accepted, was that the instrument not being sealed by the railway company no action would lie against them as upon a special contract. A dispute arose between the counsel on that trial about the reception of evidence to explain the contract, and when such evidence was rejected, then the company's counsel rested the defence against that part of the demand arising out of the contract, on the ground that the document not being under the seal of the company the plaintiffs could not succeed upon that branch of the case. It was so held by the learned Chief Justice who presided, and the plaintiffs then recovered for the wood delivered and accepted.

The plaintiffs contended that this evidence was sufficient to enable them to recover against the defendant for a false representation that he had authority to bind the company to the contract.

Becher, Q. C., on the part of the defendant, took the following objections to the case being submitted to the jury on the evidence—1. That there was no proof given that the plaintiffs themselves ever actually signed the contract in order that it might be binding on them. 2. That there was no proof of any representation, false or otherwise, as inducing the contract to be entered into, and the mere production of the paper signed by the defendant, with proof of what

took place at *nisi prius* as to the ground upon which the company resisted a claim upon the written document, was not sufficient to charge the defendant with fraud ; that no judgment was put in, or proved, to establish that the company was not bound by the contract. 3. That it must be assumed the plaintiffs were well aware they were contracting with a corporation, and they could not be heard to say they were deceived in any way by the defendant for want of the corporate seal ; they must be taken to know from what appeared on the face of the instrument that the defendant could not himself by his signature merely bind the corporation. 4. That the contract disclosed upon the face of it that the company were the principals, and that the defendant was only an agent, and therefore no deceit was shewn. 5. That so far as was disclosed the agent's want of authority was known, as it must be taken, to both parties, and therefore the paper signed was not the contract, but only initiative to the contract being prepared therefrom. 6. That the board of directors could not delegate an unlimited authority to the defendant, as would appear to be claimed in establishing such a contract as this.

Eccles, Q. C., for the plaintiffs, contended that there was but one point in the case and objections, whether there had been a fraudulent representation, and upon that he claimed to go to the jury.

The learned judge considered there was no evidence upon which to submit the case to the jury. He remarked that there was not a word said or an act done by the defendant proved outside the written paper. The paper itself did not profess to say that the defendant was their agent, and he himself when signing it did not profess to bind the company by any act, but merely says, in witness whereof we have set our hands: that the company being chartered by acts of the legislature, the plaintiffs must be taken to have known that such a mode of signature could not bind the company, even though the defendant had told them he could so bind them : that the plaintiffs' claim must be based upon inference merely, from the fact of their having proved that the company objected to being bound by reason of the want of the seal ; but the want of a seal

would not on these facts irresistibly lead to such a conclusion, for the evidence shewed a part performance on the part of the plaintiffs, and acceptance of such performance and payment on the part of the company; and though the company were not bound at law for want of a seal, yet these facts shewed ground in equity either to have the contract sealed, so that the plaintiffs might proceed at law upon it, or that a court of equity might deal with the whole matter and do complete justice. He ruled therefore that there was no evidence to submit to the jury that any false representation was established by legal evidence.

The plaintiffs took a nonsuit in deference to the judge's opinion.

Eccles, Q. C., obtained a rule to shew cause why the nonsuit should not be set aside without costs, on the ground of misdirection, and that the case should have been submitted to the jury to be disposed of by them.

Becher, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

This action seems to us to be an attempt to carry the principle sustained by such cases as *Randell v. Trimen* (18 C. B. 786), and *Collen v. Wright et al.* (7 E. & B. 302), further than there is any good ground for. Here the defendant McMillan, made no untrue representation of his authority to negotiate for a purchase of wood on behalf of the railway company. His power to do what he did seems to have been so far conceded by the company, that they accepted and paid for 35,000 cords of the wood which the defendant purchased from the plaintiffs in their name.

Afterwards, a dispute arising about some condition or circumstance of the alleged agreement, the plaintiffs sued the company as being bound by an executory contract to accept a further large quantity of wood, and the plaintiffs had no other evidence to offer of the alleged contract than the memorandum of agreement of the 29th of January, 1855, which purports to be an agreement between the company and the plaintiff, but is not sealed with the corporate seal of the company, and is signed only W. McMillan, agent.

The plaintiffs were as much bound to know as the defendant was, that if they desired to have the company legally bound to that which the defendant had stipulated for in their name, it would be necessary to have a proper agreement in the name of the company, sealed with the corporate seal. There is no ground for alleging here that the defendant stated to the plaintiffs anything that was untrue in point of fact, or that he deceived them in regard to the law, if an action could be brought on such a foundation.

We can see no distinction between this case and one in which a party acting under a power of attorney from another which authorised him to sell and convey land, or to make a lease in his name, should negotiate a lease or sale within the scope of his authority, and should afterwards, in execution of what he had agreed to do, sign his own name to a paper as agent without any seal, purporting to grant the estate in fee, or for a term of years. In such a case, as in this, there would be no misrepresentation made, nor any deception practised. The parties would merely from ignorance or inattention be doing an act imperfectly.

The plaintiffs ought to have known that if the defendant had power to negotiate for large purchases of wood on special terms, he could not by signing his own name make the company legally liable for the performance of such an agreement, and if he was either ignorant of the law, or chose to rely upon the company observing a contract to which he ought to have known they were not legally bound, he cannot in either case sue the defendant as having made a false representation to him of a fact.

In our opinion the rule for setting aside the nonsuit should be discharged.

Rule discharged.

THE REGISTRAR OF THE CITY OF LONDON AND THE REGISTRAR OF THE COUNTY OF MIDDLESEX.

When a separate registry office is established in a city or town, the books which have been kept for it must be delivered to the registrar, and it is no excuse for not doing so that memorials relating to land without the city have been improperly entered in such books.

Becher, Q. C., for the registrar of the city of London,

obtained a rule *nisi* for a mandamus to the registrar of the county of Middlesex to deliver to the registrar of the city of London certain books in his office containing memorials relating to lands within the city.

On the 7th of December, 1858, a separate registry office was established for the city of London, by a proclamation issued under the statute 22 Vic., ch. 95, and a registrar appointed. Mr. Gill, the registrar, on the 17th of December, 1858, gave notice in writing to James Ferguson, Esq., the registrar for the county of Middlesex, requiring him to deliver up all registry and other books and papers relating to lands in the city of London.

It appeared that while the registrar of the county of Middlesex registered deeds for lands in London, he entered the same in a regular series of books, labelled as follows: "Town of London, 'Lib. A., Lib. B., Lib. C., Lib. D., Lib. E., Lib. F., Lib. G., Lib. H.;" and "City of London, 'Lib. I., Lib. K., Lib. L. and M.,'" which books contained the records of conveyances of lands in the present city of London from the year 1846 up to the 13th of December, 1858, in all about 9,331 memorials, of which about 500 related to property without the limits of the city.

These were entered improperly, as it appeared, in the city registry books by the late registrar, and about ten since the present registrar succeeded, in consequence, it was stated, of the Commissioner of Crown Lands having transmitted returns and plans to the office which exhibited the lands as being within the town or city of London which were in fact not within its limits, but in the 1st and 2nd concessions of the township of London, in the county of Middlesex, and without the limits of the town or city.

It was sworn that there were some of these imperfections in every one of the volumes, and that it would be impossible to overcome the difficulty by cutting out from the volumes and binding separately those memorials which respected conveyances of lands in the township of London, because they were often written upon leaves on the other side of which were recorded memorials relating to land in the city.

Read, Q. C., shewed cause.

Becher, Q. C., contra, cited *Tapping on Mandamus*, 50, 102, 94, 95 ; *Regina v. Payn*, 11 A. & E., 955.

ROBINSON, C. J., delivered the judgment of the court.

It is of no consequence by whose fault it happened that the memorials have been thus inadvertently mixed up together. The only question is, what should be done, under the circumstances, to comply with the law, and to afford to the registrar of the city of London the means of searching fully into titles within his own office.

In our opinion the law has clearly required that the registry books, which have been kept for any city, township, &c., shall be delivered over to the register for such city, &c., when it shall have become detached, and has either been attached to another county, or has had a register office appointed within itself; and it follows that these books, which seem clearly to have been kept for the city or town of London, must, in compliance with the acts, be transmitted to the registrar for the city of London, notwithstanding by error some memorials of deeds of lands not within the city have been entered in them.

The circumstance of there being such erroneous entries in those books only shews that registrations of deeds for lands not within the city will be taken away with them, which, if the book should always remain away, and no measures were taken to supply them or copies of them to the former office, would produce inconvenience.

But according to the affidavits placed before us, the inconvenience would be eighteenfold greater to the city of London if the books are withheld from it than the inconvenience will be to the county if the books go to the city office with the 500 entries of memorials relating to lands in the county, which entries ought never to have been made in them.

The statute 16 Vic., ch. 187, sec. 1, we think, makes the case clear, when coupled with the provision in 9 Vic., ch. 34, which directed a separate book to be kept for each city, town and township.

This application has been answered as if the question was,

by whose fault it happened that the 500 memorials referred to were in the wrong books. But that is a matter wholly immaterial to the present application. The statute must be carried into effect, which is all we are now to think of.

Rule absolute for mandamus.

ROSE v. SCOTT.

Chattel mortgage—Description of goods—20 Vic., ch. 3, sec. 4.

The goods were described in a chattel mortgage as “seven horses, three lumber waggons, one carriage, one pleasure sleigh, all the household furniture in possession of the said party of the first part, and being in his dwelling house, all the lumber and logs in and about the saw mill and premises of the said grantor, and all the blacksmith’s tools now in possession of the said party of the first part, six cows and four stoves.” *Held*, a sufficient description as to the household furniture, lumber and logs, and insufficient as to the other goods.

INTERPLEADER ISSUE.—The case was tried at the last assizes held at St. Thomas, before *Burns*, J. The plaintiff claimed the goods under a chattel mortgage dated 1st of March, 1858, made by one John Fraser. The defendant was an execution creditor of Fraser.

The question reserved for the consideration of the court was, whether the bill of sale under which the plaintiff claimed was void altogether or in part, for want of a proper and sufficient description of the goods according to sec. 4, of 20 Vic., ch. 3.

The description contained in the bill of sale was as follows: “all the goods, chattels, furniture, and household stuff therein particularly mentioned and expressed, that is to say, seven horses, three lumber-waggons, one carriage, one pleasure sleigh, all the household furniture in possession of the said party of the first part, and being in his dwelling house. All the lumber and logs in and about the saw mill and premises of the said grantor, and all the blacksmith’s tools now in possession of the said party of the first part, six cows, and four stoves.”

Read, Q. C., obtained a rule to shew cause why there should not be a new trial, because the bill of sale was void in the whole or in part, or why an order should not be made restricting the plaintiff in taking his judgment on the verdict

to such of the property as was sufficiently described in the bill of sale.

C. Robinson shewed cause, citing *Harris v. Commercial Bank*, 16 U. C. R. 437, 444; *Howell v. McFarlane*, *Ib.* 469; *Wilson v. Kerr*, 17 U. C. R. 168.

ROBINSON, C. J., delivered the judgment of the court.

There is no other point to be considered in this case than whether the description contained in the mortgage of the chattels which it was intended to cover is sufficiently specific to support the mortgage against any objection under the fourth clause of the last Chattel Mortgage Act, 20 Vic., ch. 3. And if the mortgage does not in that respect agree with the statute, as to all or any part of the goods, then we are to consider what is necessarily the legal consequence of such defect.

We have always felt it difficult to determine with what degree of strictness it is proper to carry into effect the provision in the last Chattel Mortgage Act, 20 Vic., ch. 3, sec. 4, "that all the instruments mentioned in the act, whether for the sale or mortgage of goods and chattels, shall contain such efficient and full description thereof that the same may be thereby readily and easily known and distinguished."

When that enactment has not been complied with in assignments executed since that statute, which this was, the effect we have assumed to be, and we think correctly, that it cannot operate as to those chattels which are not described as the statute directs, though it may operate as to any chattels that may be sufficiently described in it. The legislature meant that in all cases, whether of mortgages or sales, there should either be an actual, immediate, and continued change of possession, or that the assignment should be made and registered in conformity with the act.

The statute does not say that an assignment which does not comply with this requirement as to a particular description of the chattels shall be void, though there might be a sufficient description given of some other of the goods mentioned in the deed.

The object, however, was to enable third parties to ascertain

what was intended to be assigned ; and if some of the chattels mentioned in the deed are not so specifically described as to ensure that end, then it must follow, we think, that as to such goods the filing the instrument will not be taken as a substitute for an immediate and continued change of possession. The more difficult point is to settle the force to be given to the words used in the act, requiring an efficient and full description, so that the goods may be thereby readily known and distinguished.

We have not held it necessary that the deed should contain such a description as would serve to identify the chattels without having recourse to any extrinsic evidence ; in other words, we do not think it reasonable to hold, that what is exacted is, that any person shall be able to find in the deed all that is required for enabling him to distinguish the chattels mentioned in it by merely casting his eye upon the chattels. For instance, if a livery stable keeper should assign by bill of sale the pair of horses which he had driven for the last two years in a public stage between Toronto and Streetsville, I think that would be a sufficient description of the horses, for there would be scores of people who could identify them, and probably they would be better distinguished in that way than by stating their age, colour, and figure unless there was something very remarkable and peculiar about them ; but yet such a description in the deed would not enable us to identify the horses without the aid of extrinsic evidence. But it is not necessary to go much at length into this matter, for we should despair of being able to lay down any standard or any test by which we could pronounce on the sufficiency of any description, and it would be dangerous and inconvenient to attempt to do it.

We must at least endeavour, however, to preserve consistency in our own decisions upon such questions as may arise in the cases brought before us, otherwise we should be leading parties into difficulty. In conformity, therefore, with what this court has held in the case referred to, of *Harris et al. v. The Commercial Bank*, we must hold, we think, that the household furniture, and the lumber and logs mentioned in the instrument, are sufficiently described to enable them to

pass, but that the horses, lumber waggons, carriage, pleasure-sleigh, blacksmith's tools, cows and stoves, are not so described that they can be held to have passed by the deed ; for these are not in any manner described, so that if Mr. Fraser owned more of any such articles of property than the number set down in the deed, it would be impossible to tell which of the class were intended to be assigned. Where a man has a number of horses, or cows, and mortgages two of each, how can it be known which of them are to be passed by the deed ? It may be that the numbers mentioned in the deed were all that the mortgagor had of the kind, but it does not say so. We have hesitated in respect to the blacksmith's tools, because the mortgagor does say of them " all the blacksmith's tools now in possession of the said party of the first part ;" but on consideration that is not more particular than saying " all his blacksmith's tools," but not describing them as those which he commonly used, or which he had in any particular place ; and if that description be good, then an assignment of all a man's flour or pork, or cattle, would be equally good, and would include all that the assignor had of the article, for he must be regarded as being in possession of all the tools that he owned of which no one was holding possession against him. This would seem to be treating the act as meaning nothing, for there is really nothing specific in such a description.

BARNES V. METCALF AND FORBES.

Debt—Statute of limitations—Acknowledgment in writing—13 & 14 Vic., ch. 61.

Defendant, one of three partners who had contracted a debt which was barred by the statute, wrote to his agent that he wished to pay his share of the debts of the firm, and offered the creditors 6s. 8d. in the £, on their giving him a release. Some of the creditors accepted and were paid, but the plaintiff refused and sued for the whole.

Held, that the letter was not sufficient to take the case out of the statute.

This action was brought to recover for the price of a quantity of stone and bricks sold and delivered, amounting to £273 11s. 11d.

The defendant Forbes suffered judgment by default.

The defendant Metcalf pleaded: 1. Not indebted, as alleged. 2nd. The Statute of Limitations.

At the trial before *Draper*, C. J., at Toronto, the balance of the amount unpaid to the plaintiff was proved to be £183 7s. 6d., if the plaintiff was entitled to recover. The defendant Metcalf left Canada for Australia in the summer of 1852. Previous to that the two defendants, together with one Wilson, had been in partnership as builders, but had failed in business and since the plaintiff had left Wilson died.

In order to take the case out of the statute, the plaintiff replied upon a letter written by the defendant to the Rev. Mr. Green, in Toronto, of which the following is a copy:—

“MELBOURNE, *August 25th*, 1853.

“Rev. Sir,—You would (I have no doubt) be surprised when I left Toronto so abruptly, but my prospects were so gloomy that I considered it was better to leave and try to retrieve myself in this distant land. I arrived here on the 5th of December last. * * * I wish to pay my share of the debts of the firm of Metcalf, Wilson & Forbes, and for that purpose I offer the creditors the first fruits of my labour, and offer them six shillings and eight pence in the pound, with interest on the amount from the date of their accepting it, because it will take same time for a letter to come to me and a remittance in return. Perhaps Mr. Green and his partner will draw out a general release, or such instrument as you think best, which, if the creditors will sign, on receiving a copy I will send you a bill of exchange on London for the amount, with whatever expenses may be incurred, then you can pay them. Mr. Geo. Bilton or Mr. Crooks will give you a list of the debts, which was affixed to the assignment, Mr. Brunskill is a creditor to the amount of about £500, he has notes which were renewed in full; the old ones were not given up. These, I am informed, he intends to make use of, but the debt does not honestly exceed £500. The list as made out by Mr. Bell, our clerk, I believe is correct, and in possession of Mr. Bilton. The amounts owing to Burgess & Leishman and Mr. Brittingham, both named in the list, I will arrange here, as Mr. Burgess, brother to Mr. Burgess of the above firm, is here and has the notes with him. One of the principal creditors, Mr. Alenson Allen, of Fairhaven, Vermont, has an agent in Toronto whose name is Benfield, a dealer in marble; Messrs. Ogden and VanAntwerp, of Yonge-street, will tell you where he may be found. I hope you will do all you can

to arrange the affair, as I have a great desire to return to Toronto as soon as I can make a moderate amount more than will pay my share. We were indebted to the Bank of Upper Canada, T. D. Harris, and Messrs. Moffatt & Murray, but the Bank accepted our interest in the church contract as payment, and Messrs. Harris and Moffatt claimed to be included in the arrangement. Will Mr. Green have the kindness to enquire into this matter, and do the best you can. Write me as soon as convenient, &c."

Mr. Green proved that some of the creditors accepted the offer made and were paid, but the plaintiff refused to accept the offer. His name is mentioned in the list referred to in the letter as a creditor for £183 7s. 6d.

The learned judge took a verdict for the defendant, and reserved leave to the plaintiff to move to enter a verdict for £183 7s. 6d. and interest, if the court were of opinion the plaintiff ought to recover.

John Bell obtained a rule to enter a verdict for the plaintiff, according to the leave reserved. He cited *Peters v. Brown*, 4 Esp. 46; *Waller v. Lacy*, 1 M. & Gr. 54; *Hart v. Prendergast*, 14 M. & W. 743.

Eccles, Q. C., shewed cause, and cited 6 Eng. Rep. 397; *Miller v. Caldwell*, 3 D. & R. 267; *Knott v. Farren*, 4 D. & R. 179; *A'Court v. Cross*, 3 Bing. 329.

ROBINSON, C. J., delivered the judgment of the court.

Our statute 13 & 14 Vic., ch. 61, is in the very words of Lord Tenterden's Act, 9 Geo. IV., ch. 14, and after reviewing the many decisions which have taken place since that act, we are of opinion that the plaintiff cannot recover upon the letter, which is the only evidence in writing to be relied upon for proving either an acknowledgment or a promise. There have no doubt been many decisions before the case of *Tanner v. Smart* (6 B. & C. 603), which might be cited as supporting the plaintiff's action, for many of the older cases can hardly be said to have required more to be proved than the bare admission of a debt as still existing, an admission in almost any form of words and however qualified, but there was a tendency to give an effect to the Statute of Limitations more in favor of the debtor, long before any change had been made in the law by Lord Tenterden's Act,

and though that act contains nothing that in terms requires a written promise in addition to a written acknowledgment, yet the courts have shewn a greater inclination since it passed than they had shewn before to depart from such decisions as appeared to be inconsistent with the protection against staled demands which the statute was intended to afford.

We consider it clear that, admitting the defendant Metcalf in this case to be bound by any acknowledgment or promise contained in his letter to Mr. Green, who was neither the plaintiff, nor an agent for the plaintiff, nor a person having any privity with the debt alluded to, yet that letter to Mr. Green contained no unconditional promise to pay, and more than that, it is in such terms as do not leave us at liberty to infer from it a promise to pay, such as we might have inferred if the letter had simply admitted the debt, and stated nothing further. It plainly shews that Metcalf desired to make such arrangements with his creditors as would permit him to return without fear of being molested by them.

He was in a situation, owing to the lapse of time, to refuse payment altogether if he pleased of this simple contract debt, but he voluntarily offered to pay what he calls his third of it, having been one of three partners by whom it was contracted, and he shews that he would not pay even that third to any who would not take it on the condition of releasing him from the whole debt. The plaintiff was not willing to do this' and he preferred taking his chance of getting more, and rejected the offer.

We are clear that the defendant's letter cannot be made use of to prove a promise, express or implied, either to pay the whole debt or the third part of it. It contained no express promise to do so : that is very clear : and it does not allow us to imply a promise from it to pay unconditionally either the whole or a part, because it expresses what alone the defendant did undertake to do, namely, to pay one-third to such creditors as would take it in full and release him from the whole debt, which the plaintiff refused to do.

In our opinion the rule for entering a verdict for the plaintiff must be discharged.

Rule discharged.

UTTER V. THE GREAT WESTERN RAILWAY COMPANY.

Permission to make a ditch over plaintiff's land—Negligence in making it—Action therefor—Pleading—Agreement to accept, and payment in satisfaction—Traverse of payment.

Sixth count—That defendants so negligently constructed their railway, and made their ditches &c., so carelessly, that they caused the surface water on each side of the railway crossing the plaintiff's farm to flow out of the ditches and injure the crops; that to remedy this the plaintiff allowed defendants to cut a ditch leading from their ditches across the plaintiff's land to the lake; that they began to make such ditch, and it thereupon became their duty to use proper care, so that it should be sufficient to carry off the water, but they made it only a short distance, and of insufficient size, so that it brought down the water upon the plaintiff's land and left it there.

Seventh count—That by articles of agreement between the plaintiff and defendants, reciting that the plaintiff had conveyed certain land to defendants for their railway, defendants covenanted that they would make a sufficient crossing on the plaintiff's land: that they made their railway, but neglected to construct the crossing, whereby the plaintiff was put to inconvenience, &c.

Among other pleas, defendant pleaded to this count a former action on the same covenant, alleging that in that action, after issue joined, it was agreed that defendants should pay £125, in full satisfaction and discharge of the cause of action, and that the plaintiff should accept the same, and that the £125 was thereupon paid and accepted, &c., to which the plaintiff replied, traversing the payment and acceptance in satisfaction, &c.

An agreement was proved purporting to be between the plaintiff and defendants, but executed by the plaintiff only, wherein it was stated to be agreed that the company should dig the ditch as mentioned in the sixth count; and a memorandum was added under the plaintiff's signature, that they would continue and deepen his ditch, if necessary, to carry off the water. It was proved also that they did begin the ditch, but made it only part of the way to the lake, so that the only effect was to lead the water from the railway on to the plaintiff's land. As to the plea to the seventh count, the plaintiff wished to shew that besides paying the £125, defendants were to make the ditch to the lake.

The jury found for the plaintiff, £75 on the 6th count, and £200 on the 7th.

Held, that the plaintiff was entitled to recover upon the 6th count, for although the defendants were not bound to make the ditch at all, yet, as they had commenced it by the plaintiff's permission, they were liable for injury caused by their carelessness in constructing it.

Held, also, that on the seventh count, under the plaintiff's replication the only question in issue was the payment of the £125, not the agreement to accept it in satisfaction, and that the verdict on that count could not be sustained.

The plaintiff's declaration contained seven counts. The first five counts were for alleged injuries to the plaintiff's cattle, sheep and pigs, by the locomotive running on defendants' railway. On the first, second, fourth and fifth counts, the defendants paid money into court, which the plaintiff accepted in satisfaction of those counts. On the third count the defendant paid money, £10 15s., into court. The plain-

tiff replied damages ultra, and on that issue he had a verdict of £1 15s., which the defendants did not move against, so that the only counts to be considered in disposing of the rule were the sixth and seventh.

The sixth count charged that the defendants so negligently constructed their railway across the plaintiff's farm, and made their ditches, excavations, culverts, embankments, &c., so carelessly and unskilfully, that they caused the surface water on each side of the railway crossing the plaintiff's farm to run and flow out of the ditches, &c., over the plaintiff's farm on the south side of the railway, and to injure the soil, and the hay and other crops growing thereon. That to enable the defendants to remedy this inconvenience, and to carry off the water through the plaintiff's land into Lake Ontario without doing injury, the plaintiff, on the 1st of January, 1856, allowed defendants to cut a large ditch, leading from the ditches, excavations, &c., of the defendants across the plaintiff's land into Lake Ontario. That the defendants commenced to make such ditch, and that it became thereupon their duty to use proper care and skill in making the same, so that it should be sufficient for carrying off the water without overflowing. That they made it only for a small distance from the railway, and not of sufficient length, width, or depth, nor with a sufficient fall to carry off the water through the plaintiff's land, so that it brought down a great quantity upon the plaintiff's land and there left it, whereby it spread over the plaintiff's land, and destroyed and damaged his grass, crops, &c.

In the seventh count the plaintiff charged that by articles of agreement between plaintiff and defendants made on the 3rd of August, 1852, and sealed with the seal of the defendants, reciting that the plaintiff had conveyed certain lands to the defendants for the use of their railway, the defendants covenanted with the plaintiff that they would, in constructing their railway, make a sufficient bridge, crossing or passage way, over or under their railway, on such portion of the plaintiff's land as might be most convenient for constructing the same, and would make sufficient fences on each side of their line, and would maintain the same, the crossing

to be so constructed as to afford all reasonable convenience for teams and waggons, loaded and unloaded, to pass and re-pass. And the plaintiff averred that on the 1st of January, 1853, and before this suit, the defendants made their railway across the plaintiff's land, but did not then, or at any time afterwards, erect and make a sufficient bridge, crossing, or passage-way over or under their railway, convenient for teams, &c., to pass, by reason of which neglect to perform the said covenant the plaintiff had been put to great inconvenience and expense, and obliged to go by a very circuitous route from one part of his farm to the other.

The defendants pleaded to the sixth count, not guilty, and secondly, that they did what is complained of for the convenience of the plaintiff, and at his risk as to the sufficiency thereof, and by the plaintiff's leave and license.

And to the 7th count. 1st—*Non est factum*. 2nd—That on the 13th of April, 1855, the plaintiff commenced an action against the defendants for the same breaches of the covenant in the same agreement as are complained of in the seventh count. They set out the pleadings in that action, by which it appeared that they pleaded performance of their covenant in regard to the constructing a sufficient bridge, crossing, or passage-way, &c., over or under their railway, &c.; that issue was joined upon such plea, and on the 9th of May, 1855, the record upon such issue went down to be tried, when it was agreed between the plaintiff and the defendants that the defendants should abandon their pleas, and should pay the plaintiff £125 in full satisfaction and discharge of the causes of action, &c., and that the plaintiff should accept the same, &c., and that the £125 was thereupon paid and accepted in full satisfaction and discharge, &c.; and defendants averred that the covenant and causes of action were identical with those mentioned in the pleadings in this cause.

The plaintiff replied, taking issue upon the first plea to the seventh count, and to the second plea to that count he replied, traversing the payment and acceptance of money as mentioned in the plea, in full satisfaction and discharge

of the causes of action in the seventh count mentioned (not denying that the causes of action were identical.)

The jury found a verdict for the plaintiff on the sixth count for £75 damages, and on the seventh count for £200.

At the trial at Hamilton, before *Hagarty, J.*, it was proved that in the summer of 1855, a writing was signed and sealed by the plaintiff, and purporting to be between him and the defendants, wherein it is stated to be agreed, in consideration of the damages agreed to be paid in May then last past, and in carrying out a final settlement between the parties, that the Great Western Railway Company shall carry and dig a ditch of sufficient width and depth from the cattle pass, on lot 17, 1st concession of Saltfleet, across a small potatoe field to the head of a ditch leading towards the lake already dug by the said Henry Utter, the said ditch to be dug so soon as the said Utter should give notice of having taken his potatoe crop from the said potatoe field; and the said damages so agreed to be paid as aforesaid, namely, £125, together with the costs of the action now pending between the said parties, to be paid without further delay, which is to be a final settlement and bar of all claims and demands for past and future damages, by reason or on account of the flow of water, or obstruction of water, or otherwise on account of the water by reason or by means of the works or operations of the Great Western Railway Company. The Company to be at full liberty to carry the water to the said ditch across the whole of lots 16 and 17 in the first concession. The said Henry Utter has been this day paid £25 of the said damages, the remaining £100 thereof to be paid to his attorneys Messrs. Freeman and Craig, dated 27th July, 1855. The above payment is in full of all claims and demands whatever of the said Henry Utter against the Great Western Railway Company, except for some lumber taken last spring by order of Kenneth Ross, track inspector. The said Henry Utter having been paid £2 for two sheep killed on the railway. Under the signature and seal of Henry Utter was written, "*Mem.*—We will continue and deepen Utter's ditch, if necessary, to carry of the water."

But though the plaintiff executed this agreement in presence of a subscribing witness, there was no execution of it in any manner by or on behalf of the defendants.

In the autumn of 1855 the defendants did begin to dig such a ditch as was spoken of in that agreement, although they were not in any manner legally bound to do so, whatever might have been at any time intended, or talked of.

The plaintiff's complaint was, that the defendants began the ditch too late in the season to carry it through, and instead of taking it to the lake, as was anticipated when they began it, they dug only a few rods of it and made that of insufficient depth, so that the only effect of what they did was to lead the water from their line of railway and out of the holes and hollows in which it had been collected there into the plaintiff's fields, from which it could not escape otherwise than by flowing over the sides of the ditch, and spreading over the adjacent lands, thereby injuring the soil and destroying the crops. The plaintiff proved by several witnesses that this had occasioned a good deal of injury to him in 1855 and 1856, and it was for that injury that the jury gave £75 damages upon the sixth count. There was evidence that the railway had the effect of carrying off the water from the plaintiff's land, so that in general it was not so wet as it used to be before, but there was strong evidence to shew that much injury arose to the plaintiff from the unfinished and defective ditch complained of.

As respects the seventh count, there was evidence which proved that the £125, spoken of in the pleadings, was paid to the plaintiff's attorneys in satisfaction of the injuries complained of in the former action, of which the pleadings are set out in the second plea to that count.

The plaintiff's attorney in that action was called as a witness for the defendants upon this trial, and he swore that the defendants paid him the £125: that he thereupon withdrew the record, and it was accepted in satisfaction, not only of the damages sought to be recovered in that action, but also in satisfaction, as he thought, of another cause of action upon which they were going to trial, of the same nature as that complained of in the sixth count.

The plaintiff on the trial denied that the £125 was accepted by him in satisfaction, and contended that it was part of the arrangement, that besides paying that sum the defendants were also to make the ditch through the plaintiff's land, from the railway to the lake.

The defendants, on their part, insisted that the plaintiff's answer to the defendant's special plea to the seventh count only denied the fact of payment of the £125, and that the agreement that it was to be paid and accepted in full satisfaction not being traversed, stood admitted upon the record.

The learned judge acceded to that view. He held that the plaintiff by his answer to the plea admitted that the causes of action were identical, and admitted also the agreement alleged, to take £125 in full satisfaction and discharge, and that the replication only put in issue the fact of payment, which payment was fully proved. He therefore considered that the plaintiff's action failed upon both counts.

The jury, however, found for the plaintiff on both counts, giving upon each severally the damages mentioned.

Cameron, Q. C., obtained a rule for a new trial on the law and evidence and the judge's charge, contending that no cause of action was proved on which damages could be recovered on the sixth count, and that in regard to the seventh count, there was nothing in issue on the pleadings except the alleged payment in satisfaction and discharge of the former action, which ought to have been found in defendants' favour upon the evidence; or to reduce the verdict to the £1 15s., found for the plaintiff upon the third count, and enter a verdict for the defendants on the sixth and seventh counts, or to arrest the judgment.

O'Reilly, Q. C., shewed cause, and cited *Coggs v. Barnard*, 1 Sm. Lea. Cas. 145.

Cameron, Q. C., contra, cited *Hey v. Moorehouse*, 6 Bing. N. C. 52; *Broom Com.* 676; *Clegg v. Dearden*, 12 Q. B. 576; *Taylor v. Stendall*, 7 Q. B. 634; *Humphries v. Brogden*, 12 Q. B. 739; *Jeffries v. Williams*, 5 Ex. 792.

ROBINSON, C. J., delivered the judgment of the court.

It appears to us that the damages given—that is, £75,

upon the sixth count, and £200 upon the seventh—cannot be looked upon as excessive if confidence were placed in the evidence given on the part of the plaintiff.

With regard to the sixth count, it was shewn on the trial that the plaintiff allowed the defendants to make a ditch from their line across a potatoe field of the plaintiff to the head of the ditch which the plaintiff had dug or was digging towards the lake in order to drain the water from his farm.

The complaint is, that the defendants began the work, but not in sufficient time, and carried it only part of the way, and then left it unfinished, so that it led the water from the defendants' railway upon the plaintiff's land, and the ditch being too small and shallow the water overflowed upon the plaintiff's land and destroyed or damaged his crops.

The plaintiff could hardly have brought trespass for this alleged injury, for he had given permission to the defendants to enter upon his land and dig a ditch larger than they had dug, and the defendants' non-feasance in not carrying their work through would not make them trespassers *ab initio*. But if the defendants, availing themselves of the plaintiff's license to enter and dig a ditch, dug it in such a way as not to answer the purpose which they must have known was intended, leaving it imperfect, and of insufficient width and depth to contain and carry off the water, and thereby did a serious injury to the plaintiff by carrying the water off from their line of railway upon his fields, and there leaving it without proper means of escape, the plaintiff can well complain that by their negligent and incomplete way of doing what he had allowed them to do they had occasioned much damage to his land and his crops. His complaint as to the extent of injury may have been exaggerated and unreasonable, but we do not think the evidence shewed it to be so.

The defendants, however, maintain that there was no duty incumbent on them to go on with the ditch, and to make it a sufficient one. No doubt, if the defendants had not set to work to make a ditch on the plaintiff's land, there is nothing before us from which we could hold that they could be sued for breach of duty in not making a

ditch of any size or length whatever on the plaintiff's land, for undoubtedly there is no seal or signature of the defendants by which they have bound themselves to execute any work of the kind.

If, therefore, they had kept away from the plaintiff's land and not led the water from their land upon his, there would certainly have been no right of action against them for not making a ditch through the plaintiff's land or any part of it. But, after what did take place, the plaintiff is in a situation to say to the company, that they did by his permission enter upon this land to make a ditch; and we may fairly infer that they did this to save themselves from inconvenience or damage, or claims for damages, rather than exclusively for his advantage; and this being so, it was, we think, to be considered by the jury whether the defendants had or had not availed themselves in good faith of the privilege, or whether they had not acted vexatiously, and with culpable negligence, thereby abusing the permission given to them. If A. sells or gives B. permission to go upon his land and take certain trees growing there, and B. fells the trees so carelessly, as without necessity to injure A.'s fences or his crops, no doubt A. would have an action for the injury. It is true there is no such writing actually executed between the parties as was certainly in contemplation, but the company through their servants have done certain acts, and we can enquire for what purpose and with what spirit they did those acts. When the jury saw the writing which Utter executed, and which was witnessed by the solicitor of the company, they could not doubt what was the object in digging the ditch, and that the plaintiff had a good right to expect that the ditch which he had himself dug would be continued and deepened, if it should prove to be necessary for carrying off the water. The defendants were as well able to observe and judge of that as the plaintiff.

In our opinion the evidence entitled the plaintiff to recover on the sixth count.

As to the seventh count, we agree in the view taken by the learned judge at the trial, that the fact of payment alone was in issue, not the agreement to pay or to accept

the £125, in full discharge and satisfaction of the causes of action in that count; and that being so, the plaintiff, in our opinion, could not set up at the trial that the defendants undertook to do something else besides paying the money, for that would be inconsistent with the agreement set out and not denied.

And indeed, if the plaintiff desired the jury to draw from the evidence which he did produce, (we mean the paper signed by him,) the inference that the payment of £125 was not to bar all such claim as is set up in the seventh count we think he desired to draw them to a conclusion not easy to be reconciled with the evidence.

In our opinion the verdict for the plaintiff on the seventh count was rendered against law and evidence, and we think that on that account there should be a new trial, without costs, as the jury were distinctly recommended not to find for the plaintiff on that count.

We think it right to add that, according to our present impression, the plaintiff, after accepting the £125 upon the understanding expressed in the paper which he signed, would find it difficult to support an action for the cause of action in the seventh count under any state of the pleadings consistent with the facts.

BOULTON AND MCCARTHY V. SMITH (SHERIFF, &C.)

Chattel mortgage—Affidavit—Omission of the words, “against the creditors of the mortgagor”—Statement of contingent liability—20 Vic., ch. 3—Action against sheriff—Direction to levy on one of several defendants—Abandonment of such direction.

L. executed a chattel mortgage to the plaintiffs for £140 2s. 5d., reciting that he was indebted to them in £214 10s. 11d. : that they had become security for him as indorsers of a note for £25 11s. 6d., making together £240 2s. 5d., for £100 of which he had previously given them another mortgage. The affidavit filed with this mortgage stated that defendant was justly and truly indebted to the plaintiffs in £214 10s. 11d. : that £100 of it had already been secured : that the liability of the plaintiffs, with the sum of £25 11s. 6d. for the said L., was truly set forth in the mortgage ; and that the said mortgage was executed in good faith, and for the express purpose of securing the payment of the money so justly due as aforesaid, and of securing the plaintiffs in their said liability, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage, or preventing the creditors of the said L. from obtaining payment of any claim against him.

In an action of trespass against the sheriff for seizing the goods under an execution.

Held, 1. That the affidavit was insufficient, for omitting to state that the mortgage was not made for the purpose of protecting the goods "against the creditors of the mortgagor," those words being required by the statute. 2. That the mortgage was defective, in not shewing sufficiently the terms, nature, and effect of the liability incurred by indorsing.

It appeared that the plaintiff's attorney in the execution had directed the sheriff not to sell the goods of L., but to levy upon another defendant in the suit; that that defendant having remonstrated and urged him to sell, he telegraphed to the attorney to know if he should do so, and in answer, was told that he must act as he thought fit, according to his own judgment.

Held, that this answer was an abandonment of the first direction.

Quare, however, whether the plaintiffs could have sustained an action against the sheriff for disobeying such instructions, they not being parties to the suit.

This is an action against the defendant for converting the plaintiff's goods.

Pleas—not guilty, and not possessed.

At the trial, before *Draper*, C. J., at Barrie, the plaintiffs proved a chattel mortgage from Christopher R. Lee to themselves, dated 4th of June, 1857, to secure the sum of £100, with a proviso for the payment of £100 on the 4th of June, 1858, with interest. This instrument was filed on the 5th of June, 1857, with the necessary affidavit of execution by the mortgagees that the debt was due, and that the bill of sale was *bona fide* made to secure the debt, and not to protect the goods. This instrument was not re-filed within the year, though it appeared the debt was not liquidated. The plaintiffs proved a further bill of sale to them from Lee, dated 18th of August, 1857, by way of mortgage, to secure a further sum of £140 2s. 5d., upon the same property described in the other instrument. The statement with respect to this indebtedness was in these words, "whereas, the said party of the first part is indebted to the said parties of the second part in the sum of £214 10s. 11d. currency, and whereas the said parties of the second part are security as endorsers on a note of £25, in a sum of £25 11s. 6d. for the said party of the first part, making together a sum of £240 2s. 5d. And whereas the said party of the first part hath heretofore given to the party of the second part a bill of sale by way of mortgage on the goods after mentioned to the sum of £100, part of the said indebtedness, and hath proposed to

secure to the said parties of the second part the balance of said indebtedness and security, making together the sum of £140 2s. 5d., by bill of sale by way of mortgage of the goods and chattels after mentioned." The proviso for payment was, that the £140 2s. 5d. should be paid with interest on the 1st of January, 1858. This instrument was, with an affidavit of the execution thereof, filed in the office of the county clerk on the 18th of August, 1857. The affidavit of one of the mortgagees attached was in these words, "I Dalton McCarty, of the Town of Barrie, in the County of Simcoe, Esquire, in the annexed bill of sale by way of mortgage named, make oath and say, *first*, that Christopher E. Lee, the morgagor in the annexed bill of sale by way of mortgage named, is justly and truly indebted to D'Arcy Boulton and me, the mortgagees therein named, in the sum of £214 10s. 11d. *Second*.—That the said Christopher E. Lee heretofore, on or about the 4th of June last, executed unto the said D'Arcy Boulton and me a bill of sale by way of mortgage, in consideration of £100, which sum of £100 is parcel of the above mentioned sum of £214 10s. 11d. That the liability of the said D'Arcy Boulton and me, with the sum of £25 11s. 6d. for the said Christopher E. Lee, is truly set forth in the bill of sale by way of mortgage. *Thirdly*.—I further say, that the bill of sale by way of mortgage was executed in good faith, and for the express purpose of securing the payment of the money so justly due as aforesaid, and of securing the said D'Arcy Boulton and myself in our said liability, and not for the purpose of protecting the goods and chattels mentioned in the said bill of sale by way of mortgage, or preventing the creditors of the said Christopher E. Lee from obtaining payment of any claim against him." Lee remained in the possession of the goods, and on the 28th of June 1858, the defendant's officer by warrant seized the goods and sold them upon execution.

The defendant proved a judgment obtained by the Bank of Toronto against Lee and some other defendants, one of whom was McCarthy, one of the plaintiffs in this suit. The judgment was entered on the 7th of June, 1858. and a *fi. fa.*

thereon placed in the defendant's hands on the same day, and under this writ the goods were sold.

The following objections were then raised to the plaintiff's recovery.

1st.—That the title could not be derived under the first bill of sale dated 4th June, 1857, for want of being re-filed before the sheriff seized on the 8th of June, 1858.

2nd.—That the second bill of sale dated 18th August, 1857, could not confer title, for several reasons: the statute 20 Vic., ch. 3, came into operation on the 1st of August, 1857, and by section 3 power was given to enable persons to take security by way of mortgage to secure a future liability for the mortgagor, not extending longer than one year from the date of the mortgage, and that an affidavit of a certain description was thereby prescribed: that this mortgage was an attempt to combine a debt due under the first section of the act with a debt to become due under the third section of the act, but did not give any particulars of the debt which was to become due, and therefore the act was not complied with. Further, that the affidavit of the mortgagee did not comply either with the terms of the first section or of the third section: it was an attempt to combine both, but did not comply with either. That the affidavit omitted to state that the mortgage was not for protecting the goods "against the creditors of the mortgagor."

The plaintiffs then went into evidence with a view of rebutting these or some of these objections; It was proved that on the 10th of June, 1855, the attorney for the execution creditors, the Bank of Toronto, through these plaintiffs, gave notice in these words:

"MR. SHERIFF.—You will please levy the amount of the *fieri facias* in this cause off the defendant, Henry Fraser, and if he should not have effects sufficient from which the debt and costs can be made, then we will instruct you further. In the meantime you will keep possession of the property of the defendant Lee."

On the 21st of June a further notice was given, in these words:

"MR. SHERIFF.—I hereby direct you (as before, upon the

10th of June, instant, through my agents, Messrs Boulton and McCarthy, I directed you) to levy the debt and costs in the case of the defendant Henry Fraser, if he has enough of which the same can be made, and if he has not, then I will instruct you further. You are further required to take notice that you are not to levy upon the defendants Christopher E. Lee and Dalton McCarthy unless I instruct you so to do. You will therefore please abandon any seizure you may have made upon either or both of said defendants."

The defendant Fraser in the execution, it appeared, urged the sheriff to keep possession of Lee's goods, that is, the goods mentioned in the bill of sale, and sell them to satisfy the demand, on the ground that Lee was the primary debtor and ought to pay the amount; and McCarthy, another defendant, wished that the amount should be made from Fraser and to effect that object, the attorney for the Bank of Toronto acted with McCarthy. The sheriff subsequently sent a telegraphic message to the attorney for the Bank, in these words: "Will I sell Lee's goods to-day according to Fraser's instructions? Answer." The answer was this, "You must act as you think fit, according to your own judgment."

The sheriff considered this answer as an abandonment of all further desire to control him in making the money on the writ of *fieri facias*, and he sold the goods mentioned in the mortgage as Lee's goods.

The plaintiffs contended that the plaintiffs' attorney in the *fieri facias* had a right to control the action of the sheriff as to whose goods should be seized, and that the answer given by the attorney for the bank was no abandonment of the instructions given on the 21st of June, 1858.

The learned Chief Justice left the question of value of the goods to the jury, who found it to be \$452, and he entered the verdict for the plaintiff subject to the opinion of the court, who might order the judgment to stand for the plaintiffs, grant a new trial, or order a nonsuit.

McMichael, for the plaintiffs, cited *Hunt v. Hooper*, 12 M. & W. 664; *Howard v. Cauty*, 2D. & L. 115; *Levy v. Abbott*,

7 D. & L. 185; Barker v. St. Quintin, 12 M. & W. 441; S. C. 1 D. & L. 542.

Richards, Q. C., contra, cited *Olmstead v. Smith*, 15 U. C. R. 421; *Tuton v. Senond*, 4 Jur. N. S. Ex. 365; *Hatton v. English*, 7 E. & Bl. 94.

ROBINSON, C. J.—This case turns, in the first place, upon the sufficiency of the affidavit made for the registration of the chattel mortgage made on the 18th of August, 1857.

It was necessary in regard to that mortgage to observe the provisions of the last statute respecting chattel mortgages, 20 Vic., ch. 3, which passed on the 27th of May, 1857, and was to take effect on the 1st of August following. That act provides, among other things, that every mortgage, &c., of goods and chattels made in Upper Canada which shall not be accompanied by immediate delivery, &c., shall be absolutely null and void as against creditors and subsequent purchasers or mortgagees, unless the mortgage, &c., or a true copy thereof, shall be registered within five days from the execution thereof, and it requires that the mortgage (or copy thereof) to be so filed shall be accompanied with an affidavit of the mortgagee or his agent, that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned: that the mortgage was executed in good faith, and for the express purpose of securing the payment of the money so due or accruing due, "*and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or preventing the creditors of such mortgagor from obtaining payment of any claim against him.*"

The affidavit of one of the mortgagees, filed with this mortgage, states that the mortgagor, &c., is indebted to the mortgagees in the sum of £214 10s. 11d. That on or about the 4th of June previous he had executed a mortgage to them to secure them in £100, part of that sum; that the liability of the mortgagor to them in £25 11s. 6. for the said mortgage is truly set forth in the bill of sale by

way of mortgage; that the said bill of sale by way of mortgage was executed in good faith, and for the express purpose of securing the payment of the money so justly due as aforesaid, and of securing the said *mortgagees in their said liability, and not for the purpose of protecting* the goods and chattels mentioned in the bill of sale by way of mortgage, or preventing the creditors of the said mortgagor from obtaining payment of any claim against him.

If this mortgage had been merely for an absolute debt due, the affidavit must then have conformed to what is directed in the first clause of the act. This does not so conform, for the mortgagor making it only swears that this mortgage was not made for the purpose of protecting the goods and *chattels mentioned therein*, or preventing the creditors of the said mortgagor from obtaining payment of any claim against him, instead of swearing, as the statute requires, that this mortgage was not made for the purpose of protecting the good and chattels mentioned therein "*against the creditors of the mortgagor.*"

The omission of the words "against the creditors of the mortgagor," may or may not have been intentional, but without these words the direction in the statute is not complied with, and I cannot say that those words are so clearly insignificant that we are at liberty to dispense with them. If, by reason of what is said in the affidavit, and also in the mortgage, of the mortgage having been given in part for securing the mortgagees against a liability which they had incurred for the mortgagor by endorsing a note for £25, we should look upon this as a mortgage not coming entirely within the first clause, but rather within the third clause, then it must be held that the affidavit does not comply with what is required in the third clause, on account of the omission of the words "*against the creditors of the mortgagor,*" which are directed to be inserted in the affidavit under this clause as well as in that under the other. And there is, besides, this substantial defect, that as regards the liability for £25 incurred by indorsing, this mortgage does not shew the terms, nature and effect of that undertaking. We

cannot see from anything in the mortgage or affidavit when the bill or note had become, or would become payable, nor is there indeed any such particular statement of it as the act requires.

I think we cannot hold a mortgage valid which does not contain such a statement, when the circumstances call for it, and that we must therefore give judgment for the defendant.

It is not necessary to dispose of the other point, but I incline to the opinion that our judgment upon that must also have been given for the defendant.

I infer that after the sheriff had been told not to seize the goods of Lee, but to levy the money upon Fraser, Fraser who was merely surety for Lee, remonstrated with the sheriff against the injustice of such a course, and that the sheriff being perplexed by this, applied to the plaintiffs' attorney, who thereupon sent him the last message, "that he must act as he thought fit, according to his own judgment." That fairly imported that the plaintiffs' attorney did not insist on his former instructions, but left the sheriff to do as should seem to him right.

And this is independent of another material consideration, namely, whether these plaintiffs can derive a ground of action against the sheriff from the fact of going against the instructions of the plaintiffs' attorney in an action in which they were not parties. The command of the writ, it may with reason be argued, is all that he requires to justify him as against strangers, so far as any direction of that kind is concerned.

BURNS, J.—A good deal of stress was placed by the plaintiffs upon the circumstances that the plaintiffs' attorney in the writ of *fi. fa.*, that is, of the Bank of Toronto against Lee, had given directions to the defendant, the sheriff, not to sell Lee's goods, but to sell the goods of another defendant named in the writ of execution, and that the sheriff disobeyed those directions and sold Lee's goods. Whether the sheriff was or was not bound to obey the directions of the

plaintiffs' attorney in that suit, or whether, in point of fact, the last communication made to him on the subject did not leave the matter open to the sheriff to do as he liked, seems to me of no importance in the enquiry before us in this suit. The dispute between these plaintiffs and the defendant is, whether the plaintiffs were the owners of the property sold or not. Whether Lee could have any ground of complaint against the defendant for selling his goods when the attorney for the plaintiffs in the execution directed him not to sell, is quite another question. Whatever rights Lee might have had could not be transferred with his goods to the plaintiffs so as to give them a right of action beyond their own title, and therefore we cannot see what it is to these plaintiffs whether the defendant disobeyed the directions or not. The property is either theirs or it is not, and by their paper title they must either stand or fall, for they never had possession of the property.

The plaintiffs rely upon the bill of sale of the 18th of August, 1857, made since the last of those statutes came into operation. This bill of sale is an additional security; that is, it is for a further sum beyond the other. It is to be observed that the first bill of sale was to secure £100 to be paid on the 4th of June, 1858. The last bill of sale was to secure £140 2s. 5d. beyond the other sum, and this £140 2s. 5d. is made payable on the 1st of January, 1858. This instrument is an attempt to combine a security by way of mortgage for a debt due under the 1st section of the last act, and to secure a liability of the plaintiffs for an indorsation for the mortgagor contemplated by the 3rd section. The recital is this, "And whereas the parties of the second part are security as endorsees for a note of £25, in the sum of £25 11s. 6d., for the said party of the first part, making, &c." When this note was to fall due is not stated in any way. The clause of the statute is clear enough, that mortgages to secure parties for indorsations cannot extend for a longer period than a year from the mortgage, so that it is necessary to see at what time the liability of the mortgagees would be incurred, that it may be determined whether the instrument

will operate as a legal security. The covenant and proviso are for the payment of the whole sum on the 1st of January, 1858, and that, too, whether the mortgagor shall have paid the note upon which the plaintiffs are endorsers before the day arrived, or whether the note in its terms may not have been payable until after the expiration of a year from the date of the mortgage. I do not mean to say an instrument may not be framed which would embrace both the objects of the first and third sections of the act, but then the information which the instrument would afford should be complete as to each upon the face of it. In this instance we are told only that a liability did exist by means of an indorsation, and then that is made a debt at once by the proviso and the covenant for payment of the money from the mortgagor to the plaintiffs, and is absolute. It does not appear to me that such is the proper construction of the third section of the act. I think this is made clear by looking at what it is enacted the affidavit of the mortgagee shall state, namely, that the mortgage was "for the express purpose of securing the mortgagee against the payment of the amount of such his liability for the mortgagor." Here the mortgage is made for securing the plaintiffs against their liability on the note, but is made absolutely to pay the plaintiffs the amount of that note on a given day, though it might not be payable as yet for all we know on the subject. If a security like the present, to cover a liability which may or may not require to be enforced, can properly be done by making the same an absolute debt *eo instanti*, and provide for the payment of it at a particular day, whether the demand be then due or may have been due perhaps before that day, the door will be opened to many frauds being perpetrated to protect goods upon such liability. Besides this, if instruments can be so framed, and be said to comply with the act, it must follow that it should be open to a jury to pronounce whether, in case a note, for instance, be payable in a month, a mortgage providing for the payment of it in twelve months, was a fraud or not. That would be and must be taken to be so now; but if the proviso and covenant were for security to the mortgagee only in case he were

compelled to pay, as I think it ought to be, we can easily see the enquiry must be very much lessened and take quite a different turn. We cannot imagine the legislature meant any thing else in the third section than to provide for counter security to the mortgagee, and therefore it is inconsistent with that view to make the security an absolute debt by a proviso and covenant to that effect.

Then the affidavit of the mortgagee is also attacked, and it does not seem to me that it complies with the statute. The affidavit with respect to this note merely says that the liability of the plaintiffs is truly set forth in the bill of sale, and the bill of sale makes it a debt due the plaintiffs, whereas the statute says the affidavit shall state that it was done for the purpose of securing the mortgagee against the payment of such liability. The importance of being told when that liability was or would be incurred is apparent.

Then, again, the affidavit is defective as respects both sections one and three, in not stating that the mortgage was not made for the purpose of protecting or securing, &c., *against the creditors of the mortgagor*. The argument is that by dropping these words the allegation is wider than mentioned in the act, and when the affidavit says it was not to protect the goods, that will mean as against any body and every body, and therefore must embrace the creditors of the mortgagor. Here, again, is a difference between the two affidavits. In the first case, of a mortgage to secure a debt due, the expression is, that the security is not given for the purpose of *protecting* the goods against the creditors of the mortgagor, but in the case of a mortgage securing the mortgagee against paying a liability, the expression is, that it was not done for the purpose of *securing* the goods against the creditors of the mortgagor. This affidavit has omitted that entirely, although it professes to state that the liability is truly set out in the mortgage. But although it may be successfully contended the construction placed upon the affidavit by the plaintiffs' counsel may be correct, that it is wider than saying it was not done to protect the goods in the deed mentioned, yet are we at liberty to say that it is a compliance with the act of parliament? There may be a

value attached to the words in compelling a person to swear that the deed was not made to protect the goods *against the creditors of the mortgagor*. It is made more specific in that way; and besides, the legislature were not professing to legislate for the whole world, but only for creditors of the mortgagor, and subsequent purchasers or mortgagees in good faith and for valuable consideration. Upon the whole, I think the claim of the plaintiffs fails as against an execution creditor, and that a nonsuit should be entered.

MCLEAN, J., concurred.

Judgment for defendant.

GOODFELLOW V. THE TIMES AND BEACON ASSURANCE CO.

Insurance—Provisional receipt—Construction of.

A receipt in the following form: "The Times and Beacon Assurance Company Agents' Office, Brantford, 3rd of February, 1858. Received from Messrs. J. Goodfellow & Co., the sum of \$14. being the premium for an insurance to the extent of \$2,000 on property described in the order of this date, *subject to the approval of the board at Kingston*, the said party to be considered insured for twenty-one days from the above date, within which time the determination of the board will be notified. If approved a policy will be delivered, otherwise the amount received will be refunded, *less the premium for the time so insured.*"

Held, not an absolute insurance for twenty-one days certain, but that the company might within that period reject the risk, and give notice, after which their liability would cease: *Burns, J.*, dissenting.

Declaration.—That whereas, on the 3rd of February, 1858, the plaintiffs applied to the defendants for an insurance against loss or damage by fire upon certain property of the plaintiff's: that is to say, an agricultural instrument factory, situate at Bradford, to the extent of £500, and for the period of three months, and then paid to and deposited with the agent of the defendants the sum of £3 10s., as and being the premium for the said insurance at and according to the usual rate of the defendants, for which premium the said agent of the defendants granted unto the plaintiff a receipt or memorandum in writing, in the words and figures following, that is to say: "The Times and Beacon Assurance Company Agents' Office, Brantford, 3rd of February, 1858 Received from Messrs. T. Goodfellow & Co. the sum of \$14.

being the premium for an insurance to the extent of \$2,000 on property described in the order of this date, subject to the approval of the board at Kingston, the said party to be considered insured for twenty-one days from the above date, within which time the determination of the board will be notified. If approved a policy will be delivered, otherwise the amount received will be refunded, less the premium for the time so insured.—For three months.”

And the plaintiff says, that the said receipt or memorandum in writing operated in law as an insurance upon the property aforesaid, to the extent aforesaid, for the space of twenty-one days certain; and that within that space of time, to wit, on the 9th day of February aforesaid, the said property of the plaintiffs, being of the value of £500 and upwards, was some wholly and some partially destroyed, damaged and lost by and in consequence of fire, to the amount in the aggregate of £500 and upwards; and the plaintiff further says, that the defendants did not at any time before the said fire either deliver to the plaintiff a policy or refund to him the premium aforesaid, or any part thereof, nor did they at any time before the said fire notify the plaintiff what the determination of the said board in reference to the matter aforesaid was, nor have they paid the said sum of money or any part thereof.

Plea.—The defendants say, that they did, within the said period of twenty-one days, and before the said fire, cause and procure the said board of their said company to disapprove of and reject the said insurance, of which the plaintiff had due notice; and thereupon they, the defendants, were ready and willing, and did offer to refund to the plaintiff the amount of the premium alleged to have been received by them from the plaintiff.

Demurrer.—That the insurance in the declaration set forth was an absolute one for twenty-one days certain, and therefore that the defendants could not within that period terminate the same, as they allege in the said plea they did.

Eccles, Q. C., for the demurrer.

Cameron, Q. C., and *M. R. Vankoughnet*, contra, cited *Hatton v. The Beacon Insurance Co.*, 16 U. C. R. 316;

Salvin v. James, 6 East 571 ; Tarleton v. Stainforth, 5 T. R. 695 ; Ellis on Insurance, 49, 75 ; Hammond on Insurance, 46.

ROBINSON, C. J.—On the argument of this case, we were told by the counsel on both sides that all that was desired was the opinion of the court upon the construction of the premium receipt given by the defendants' agent, for that the defendants do not intend to dispute their liability on any other ground, if they are liable according to the legal effect of the receipt. Then the question upon the receipt is this : do the words, subject "to the approval of the board at Kingston," mean only that the insurance for three months, for which the premium was paid, was to be subject to the approval of the board, or that what the agent did in giving that receipt was subject to their approval to such an extent that they could reject the risk at any time within twenty-one days, and that from the time they did reject it, and gave notice of such rejection, they were to be released from the risk, even for the remainder of the twenty-one days, in which case the premium must be returned, deducting a proportion for the time the property had continued to be insured

In my opinion the board could decline the risk as soon as they had knowledge of the proposal, and the property would not, against their will, be insured by them for the twenty-one days, if in the meantime they had given notice of their refusal of the risk, but would be insured only up to the time of the notice, and as in this case the loss occurred after the rejection of the risk and notice given to the applicant, the defendants in my opinion were not liable. If the twenty-one days had been suffered to elapse without approval by the board, then I think the plaintiff from that time would not have been insured, but would have been insured up to that time, provided in the mean time he had not been informed that the risk had been declined. In most policies there is a condition that the company may at any time, for such cause as they may deem sufficient, cancel the policy, and it would be very inconsistent with such a right reserved to them, of putting an end to the insurance ever after the

policy has issued, that they should against their will be held to insure for twenty-one days absolutely, and possibly upon a risk such as no prudent person would have taken with the knowledge of facts which the company may have acquired.

The construction of the receipt for which the plaintiff contends is perhaps more in accordance with its language than that which I think should be given to it, but I cannot imagine that it could have been meant by the receipt to bind the company absolute to the risk for twenty-one days, whatever circumstances might come to the knowledge of the board, and before they had entered into any contract further than this conditional one with the agent.

The words "subject to the approval of the board" should be read, I think, as applying to the whole effect of the writing, so that if within the twenty-one days the company should decline the risk, and give notice to that effect, they are not to be held nevertheless bound till the twenty-one days have run out.

I have found no case bearing directly upon the effect to be given to a premium receipt such as this is, and indeed no decision would serve as an authority, unless it was founded upon a receipt expressed in similar terms. But the case of *Hatton v. The Beacon Assurance Company* in this court (16 U. C. R. 316), and the cases cited of *Tarleton v. Stainforth* (5 T. R. 695), *Salvin v. James* (6 East 571), and *Want v. Blunt* (12 East 183, are material to be considered, as tending to shew that though the words of the writing may seem to import otherwise, yet the insurers will not be bound after they have declared their option not to accept the risk.

The words at the end of the receipt, "less the premium for the time so insured," strike me, as they do my brothers, as apparently referring to the twenty-one days, as if the agent's receipt had bound the company absolutely for that time, although they might give notice of rejecting the risk on the next day after the receipt was signed ; but I think it more reasonable to construe those words as referring to the period for which the applicant may, according to the circumstances, have continued insured within the proper meaning

of the receipt, than as extending necessarily to twenty-one days, and though notice of refusing the risk may have been given properly.

My judgment, though not given without hesitation, is in favour of the defendants, and I wish it to be understood that I am not to be taken to have expressed any opinion upon the plaintiff's right to recover in this form of action, under the circumstances, as upon an actual contract for insurance, even if the receipt had been so worded as to exclude all possibility of doubt that the intention of the receipt was such as the plaintiff contends for. Both parties intimated that it was not their desire to raise any other question than upon the construction of the receipt.

I think the defendants were no longer bound by the receipt after they gave notice that they rejected the application, and that judgment should be given for the defendants on the demurrer.

MCLEAN, J.—The plaintiff contends that the defendants' agent took the risk for twenty-one days, without any reference to the approval of the board at Kingston, and that the board, however unwilling to take the insurance, were bound by the act of their agent, and could not relieve themselves or exercise any control in the matter till the twenty-one days were expired. Now it appears to me that all that was done by the agent was intended to be and was subject to the approval of the board, and that such approval or the disapproval of the board was to be obtained and communicated to the plaintiff within twenty-one days. If approved, a policy was to issue ; if disapproved, then the amount paid was to be returned, less the premium for the time insured. The agent could scarcely have been ignorant that insurance companies generally reserve to themselves and make it a condition that a policy may be withdrawn and a risk wholly cancelled by giving to the insured a certain stipulated and reasonable notice ; and if he was aware of that fact he could not have supposed that by any authority or undertaking of his he could deprive his principals of the right to exercise their own judgments in putting an end to a risk only proposed to

be taken and in fact taken subject to their approval. If the receipt given, expressing the object for which the money was given, formed an absolute irrevocable contract for twenty-one days, then the defendants would at the mere will and pleasure of their agent, he deprived for a time of the power of rejecting a risk which he might purpose for their acceptance, however objectionable that risk might be. It is unreasonable to suppose that any agent could desire to tie up the hands of his principals in such circumstances, and I do not think it has been done in this instance.

As I understand the alleged contract, it is that the plaintiffs, subject to the approval of the board at Kingston, should be considered insured for twenty-one days, and that within that time the determination of the board should be made known. If that reading be correct, then the insurance for the twenty-one days, a time properly deemed sufficient to obtain the decision of the board, would be at any time liable to be disapproved of and discontinued, and from that time the relation of insurer and insured would cease, and could not be revived again without the consent of both parties.

If the plaintiff's proposition for insurance were approved, then from the time of such approval he would have a right to expect a policy, and such a policy would be given without reference to the time unexpired of the twenty-one days specified in the receipt ; so, if disapproved, the plaintiff's claim for insurance from the time of his receiving notice would be at an end, and after the proposition had been made on the one hand and rejected promptly on the other, the parties could scarcely imagine that nevertheless a contract must exist between them for any number of days yet to run to make the twenty-one days within which the decision of the board as to the taking of the risk was to be obtained. The premium to be deducted from the amount paid, if the risk was disapproved, was to be for *the time so insured*. That would seem to refer to the twenty-one days, and undoubtedly it would do so if no notice were sooner given, but it may just as well be taken to refer to the time to elapse between the date of the receipt and the time when the approval or disapproval of the board at Kingston should be signified.

The words "subject to the approval of the board at Kingston" seem to me to reserve the taking of the premium as well as the taking of the risk for the approval or disapproval of the board, just as much as if these words were written in large letters at the head of the receipt; and if every thing relating to the risk has been done subject to the approval of the board, it follows that the risk was refused when their approval was denied, and from that time their liability ceased. Though the terms of the receipt are to a certain extent ambiguous, yet a reasonable construction of it (bearing in mind the position and duties of the agent who gave it, and that the object for which it was given was merely as a proposition for insurance to be accepted or rejected by the defendants) seems to me to establish that it cannot be regarded as an undertaking absolutely binding on the defendants for a period of twenty-one days from its date and therefore I think that judgment in this case must be given for the defendants on demurrer.

BURNS, J.—It appears to me the plaintiff is entitled to judgment upon this demurrer. I cannot read the receipt given by the defendants' agent in any other light than that it operates as an insurance for twenty-one days at least. The premium paid is for the period of three months from the date of the receipt, and of course the twenty-one days form part of that time. The taking of the insurance was to be subject to the approval of the board at Kingston, and within twenty-one days from the date of the receipt the determination of the board should be notified. The argument for the defendants concedes that there was an insurance affected by the receipt for some period of time, but then it is said it was only till the board at Kingston would say whether the risk should be taken or not. If this be so, what then is the meaning of the expression *the said party to be considered as insured for twenty-one days* from the receipt? If the whole insurance was subject to the approval of the board at Kingston, what necessity was there for saying any thing about twenty-one days? If the defendants' argument be correct, that the insurance only

continued till the board notified their refusal to take the risk, there was no use in imposing upon themselves any restriction as to twenty-one days within which to give the notice, but when they took the premium for three months, and told the plaintiff he should be considered to be insured for twenty-one days, then one can see the reason of the thing, that if he is not to be considered as insured for the whole time of three months that *he* has *paid* his premium for, *he* should have notice of their intention within the time he is to be considered as insured, whether it will be accepted for the whole time.

I do not think the case of *Salvin v. James* (6 East 571) has any application to the present case. There the plaintiff sought to make the defendants liable upon an advertisement that if a policy were renewed within fifteen days after its expiration by payment of the premium, the party should be considered as insured during those fifteen days. In that case the defendants had, before the expiration of the policy, notified the plaintiff that the company would in future exact a higher rate of premium, and the plaintiff notified them that he would not pay it. The premises were burned during those fifteen days. No premium had been paid by the plaintiff for those fifteen days, and I think it was obvious enough by the plaintiff refusing to pay such premium as the defendants asked in order to renew the policy for another year, it must be considered the policy terminated within the year. So here, if the option to put an end to the insurance were left to the defendants upon their giving notice they would not accept, it must be treated as at an end when the notice was given. But the defendants received the premium not only for the twenty-one days, but the whole period of three months, and they must concede the point that until they do give the notice the plaintiff was insured, so that the case differs from that cited in a most important point. The question therefore is simply this, whether the defendants had an option to put an end to the insurance within those twenty-one days or not, and, as I before remarked, if they had, I can see no use in saying anything about the time, and I cannot understand why their agent should have said the plaintiff

was to be considered as insured for twenty-one days if it is not to be so taken. I think the last expression, that the amount received would be refunded less the premium for the time *so* insured helps in the construction. If the time was to be indefinite as to the period of insurance, dependant upon the giving of the notice, I think we should have found the expression to be, *for the time insured*. The use of the expression *so insured* seems to me to point at something definite preceding, and the matter precedent to that is, that the *party is to be considered insured for twenty-one days*, and it appears to me that is not dependent upon the determination of the board at Kingston. The company may be quite willing to entrust their agents with the power of insuring to the extent of twenty-one days, and not willing to go further, but reserve to the board at Kingston the right to continue beyond that length of time.

I think judgment should be for the plaintiff.

Judgment for defendants on demurrer,
Burns, J., dissenting.

WILSON V. GROVES.

Road Companies—Bridges—Right to toll—Transverse road—16 Vic., ch. 190, secs. 30, 31.

The Wortley road runs north, and intersects the London and Port Stanley Plank road within less than 100 yards of the eastern end of that road, where it enters the town of London after crossing the Westminster bridge over the Thames, the continuation easterly forming York street. The plaintiff living on the Wortley road, thus travelled, in going into London, over less than 100 yards of the London and Port Stanley road, including the bridge. The London and Port Stanley road had been purchased by the County of Middlesex from the Government.

Held, that under the proviso to section 31 of 16 Vic., ch. 190, he was exempt from toll, and that the county could not impose a charge for passing the bridge alone.

Seemle, that the county in this case owning the road, could not impose a higher rate for crossing the bridge under section 30, which allows that to be done by road companies under the sanction of the Council.

REPLEVIN for seizing a pair of mares and a waggon for 4d. toll at Westminster Bridge. It is considered unnecessary to set out the pleadings, as the judgments do not depend upon them.

A special case was stated for the opinion of the court, as follows:

Previous to the year 1843, the Wortley road over the Westminster Bridge was the only approach to the town of London from the east, west, and south. This road ran nearly two miles from the commissioners' road in Westminster in a northerly direction to the approach to the Westminster Bridge, where it turned easterly at the approach to the bridge, and over it into York street in the then town of London. The bridge then standing was built by subscription, to which the district of London contributed, and its east abutment was the west end of York street, in the said town of London, which town is separated from Westminster by the east bank of the river Thames.

In the year 1843, the Board of Works undertook to make and did make a plank road from London to Port Stanley, and in doing so took possession of the said bridge, repaired, and adopted it as part of the London and Port Stanley road, but that road extends no further than the end of the bridge and excluding its easterly abutment. Instead of using the Wortley road, they adopted a new line by extending their road westerly in the direction of York street until it intersected the Wharncliffe road, which was adopted as the new Plank Road. The toll gate was erected at the west end of the said bridge, and there the toll for the first six miles of the road was levied, but half toll was only demanded of those who lived on the Wortley road in going to or returning from the town of London.

In the year 1849 the council of the County of Middlesex acquired the London and Port Stanley road by purchase from the Government, and until January last levied the toll as it had been levied by the Government.

In the spring of 1851 the old bridge was carried away and the country built a new one, which is the bridge now standing.

In January last the Council for the County of Middlesex passed a by-law, authorizing, among other tolls, 7½d. to be levied for every pair of horses and waggon which crossed the bridge and travelled the road more than one hundred yards from either end of it, but this toll enabled the party, paying it to cross the bridge and travel over the road six

miles. But the same by-law authorised four pence toll to be levied for crossing the bridge and not travelling more than one hundred yards beyond either end of it. Until the passing of the by-law in January last, the bridge was taken to be, and had always been held as part of the London and Port Stanley road, and was purchased as such from the Government, but re-built by the council at the time above stated. The plaintiff lives on the Wortley road, within a quarter of a mile from the east end of the bridge. The plaintiff resists the payment of the toll of four pence, and replevies on the ground,—

1. That the portion of the London and Port Stanley road which he travels is but a traverse of that road of less than 100 yards between the Wortley road and York street, and he is exempt by the proviso of the 31st clause of 16 Vic., ch. 190.

2. He denies the right of the County Council, under whose authority the toll is levied, to levy a toll for merely crossing the bridge.

If the County Council have the right to levy the toll under these circumstances, judgment to be for the defendant, if not for the plaintiff.

The plaintiff in person (*C. Robinson* with him.)

McMichael, for the defendant.

ROBINSON, C. J.—The case stated by the parties seems to me to admit that the pleas of the plaintiff to the avowry are substantially true, and therefore, if the defendant meant to deny that they shewed the distress to be illegal, he should have demurred to the plaintiff's pleas to the avowry, and that would have brought the question more regularly before the court.

Upon the facts stated in the case, my opinion is in favour of the plaintiff.

I consider that the 31st section of the statute 16 Vic., ch. 190, which, by section 58, is made to apply to roads that had been constructed by the Board of Works, means that no toll is to be charged where the toll road is not used for more than 100 yards, though it is true that the words "transverse

roads " used in that section are not exactly suited to a case where, as in this instance, the toll road has not been used literally for the purpose of passing immediately from one "*transverse*" road to another over the toll road ; but the plaintiff's servant left the toll road at its eastern terminus, because it extended no further in that direction, and went along York street, which ran in a straight line from it into the town. York street is in fact a continuation of the toll road to the eastward, and any person going into London over Westminster Bridge must pass some few yards along York street, and in a line with the Port Stanley road, before he can get into any cross street leading out of York street into the city.

So long as a person coming from a transverse road into the Port Stanley and London road uses the latter road only for a distance not exceeding 100 yards, I conceive it makes no difference whether, when he leaves the Port Stanley road, he gets immediately into a road leading transversely from it, or is obliged to travel a few yards beyond the Port Stanley road before he can get into a transverse road.

The plaintiff could not have continued along the Port Stanley road till he came to a transverse road on the east end* of the bridge, because the Port Stanley road terminates at the east end of the bridge, and where the object is to get into a road or street leading in a transverse direction, it cannot be done immediately, which, indeed, the 31st clause does not require, but the person travelling must use York street for a little way till he comes to a transverse road.

The act was framed with a view to persons coming from a cross road into the Port Stanley road and using it a short distance, and then leaving it, which he would usually do by diverging into another cross road, and the person framing the act did not take into view such a case as the present, where, instead of the party leaving the road, the road leaves the party, who, if he goes forward in any direction, can use no more of the Port Stanley road.

What is meant by the clause is, that whenever a person coming from another road uses only 100 yards or less of this

toll road, and then goes from it into another road, he shall pay no toll.

The London and Port Stanley road, it is clear, commenced in the town of London on the east side of the river, and the bridge always formed part of it. The present bridge, built by the county council in 1851, after they had acquired the London and Port Stanley road from the Government by purchase, must be looked upon as being held by them just as they had held the old bridge which it replaced, and with the same right as regards tolls.

Then, if so, the 2nd section of 16 Vic., ch. 190 (at the end) makes this bridge part of the London and Port Stanley road. We have to consider also the 29th, 30th, and 31st sections of the act, under one of which power is given to the council to impose a higher toll in consequence of this bridge, upon that part of the road including the bridge, which, by the 30th section, is made part of the road. But if, under the 31st section, the council are disabled, as I think they are, from imposing any toll upon the plaintiff's waggon because it had not used 100 yards of the road in passing from one road to the other, it must follow that they cannot make him pay a *higher* toll by reason of his crossing the bridge, which is made by the 30th section a part of the toll road.

I assume that the bridge is not pretended to be held by the county municipality on any other footing than as a part of the London and Port Stanley road purchased by them ; and taking that to be so, we are to consider the statutes 12 Vic., ch. 5, sections 12 & 13, 16 Vic., ch. 190, and the Order of the Governor in Council, published in the Upper Canada Gazette of the 5th of July, 1851.

This case was argued by the defendant's counsel as if the question of the plaintiff's liability to toll turned wholly upon the effect to be given to the 31st section of 16 Vic., ch. 190, upon the facts stated.

He contended that the 30th clause, which allows a bridge to be reckoned as representing so many miles of road, according to its cost as compared with the cost of the road, is inconsistent with the plaintiff's claim to be looked upon

as travelling over less than 100 yards of the London and Port Stanley Road, notwithstanding he passes over the bridge which forms part of it, and which probably cost as much as some miles of the road in other parts. But, in the first place, the permission to make the toll *higher* for the section which includes the bridge cannot be applied in respect of persons coming to that toll gate under circumstances which entitle them to pass toll free. And, in the next place, I think we cannot hold that what is said in the 30th section about increasing the toll by reckoning so many miles of the ordinary toll road as the cost of the bridge would have constructed, has the effect of increasing the distance actually travelled upon the road, when that comes in question under the proviso at the end of the 31st clause.

It is a principle of law that taxes and tolls are not to be imposed by any latitude of construction given to an act of parliament. The authority for them must be clear and express.

It would be reasonable, perhaps, that the municipality should be allowed to impose a fair rate for passing the bridge alone, upon those persons who use no more of their road, or that they should be allowed and required to commute with them as with persons living on the line of the road; but it seems to me that to make their course clear for either, some amendment of the law is necessary.

MCLEAN, J.—The defendant avows the taking of the horses and goods mentioned in the declaration as and for a distress for toll payable on the said horses and goods, for passing over a certain bridge called the Westminster Bridge, and a part of the London and Port Stanley gravelled road, not exceeding 100 yards, and he claims a right to demand such toll for the Municipal Council of the county of Middlesex as the purchasers and owners of the said road under an act passed in the 12th year of her Majesty's reign, entitled, "An Act for the Better Management of the Public Debts, Accounts, Revenue, and Property" (12 Vic. ch. 5,) and under a by-law of the said county passed on the 28th

of January, 1858, to regulate the rate of tolls to be paid for passing over and upon the said bridge and the said part of the London and Port Stanley gravelled road, the toll to be taken therefor being at the reduced rate of four pence for every vehicle drawn by two horses or animals. The plaintiff in his pleas denies the right of the municipal council to impose or collect such toll, alleging that the distance travelled from the intersection of the Wortley road, near which he resides, with the London and Port Stanley Road, is less than 100 yards, and that under the 31st section of 16 Vic., ch. 190, the plaintiff is entitled to travel over the same free from toll.

The real defendants in this case no doubt are the Municipal Council of the County of Middlesex, and they seem to have acted as if they were in the same position as a road company, and had the same authority to impose tolls at bridges which is conferred on companies by the 30th section of 16 Vic., ch. 190.

Not having purchased from any company, they do not, under the 25th section, stand in the same position as if they had purchased from a Company; and as the tolls at bridges exceeding the ordinary rate along the roads can only be imposed by companies with the sanction of the municipal council of the county having jurisdiction in the locality, it follows, I think, that municipal councils, when they themselves become proprietors of roads, cannot act as a company might under their sanction. The 30th clause, I think, only applies when the cost of erecting a bridge exceeds to a considerable extent the cost of making two miles or more of road, and in such case the municipal council, in sanctioning an additional toll to be taken by a company, may take into account the cost of such bridge, and may calculate the toll as if for so many additional miles of road as might have been constructed by the like expenditure. But if the council had undoubtedly the same right as a company in that respect, the proviso to the 31st section must prevent the taking of any toll for merely crossing any road, or for travelling thereon in crossing from one transverse road to another when the distance does not exceed 100 yards. Now the plaintiff's pleas

shew that to have been the case at the time of the demand of toll mentioned in the avowry, and for non-payment of which the seizure was made. The bridge and part of the road, formerly part of the Wortley road, do not together make up 100 yards, and that distance is travelled on an intersection of the London and Port Stanley gravelled road by the Wortley road, and all who travel only that distance on the line of both roads where they intersect each other are entitled to pass free.

The seizure, therefore, of the plaintiff's horses and waggon for an amount of toll not legally imposed cannot be justified, and judgment must be given for the plaintiff.

BURNS, J.—The authority of the Municipal Council of the County to impose a toll over the bridge in question depends on the constuction of the 29th, 30th, and 31st sections of 16 Vic., ch. 190. No doubt, under the 30th section, the council has a right to sanction a higher rate of toll for crossing the bridge than merely charging the length of the bridge as so much of the road, and they are to take into consideration the expense of constructing the bridge in doing so. This authority, however, must be applied to those persons who travel the road, inasmuch as, though the council has the authority to put a higher toll on the bridge than any other part of the road, yet the bridge is part of the road. The proviso in the first section of the first act, 12 Vic., ch. 84, expressly enacts it to be so. The proviso in the 2nd section of 16 Vic., ch. 190, is to the same effect, except that if the bridge be within the limits of any city, incorporated town or village, then it forms no part of the road. The case admits that the bridge is not within the limits of London, and consequently it forms part of the road belonging to the county. The question between these parties, as was admitted in the argument, turns upon the 31st section of the act, and whether the proviso that no tolls shall be taken for merely crossing any road, or for travelling thereon in crossing from one transverse road to another, when the distance between such transverse roads shall not exceed 100 yards, applies to the present case. The plaintiff does not

live upon the road in question, but upon another road which touches and goes into the county road, and crosses the bridge in order to reach York street, one of the streets of the city, the distance between the plaintiff's road and York street being less than 100 yards. I am of opinion the council has no authority to exact a toll from the plaintiff, but that he comes within the exception, and that it is of no consequence that he crosses the bridge in order to reach York street. If there were no bridge there, I cannot imagine there could be any question upon the subject, and then the case just comes to this, whether the 30th section enables the council to levy a toll upon the bridge, although the 31st section would exempt the plaintiff from paying toll if there were no bridge there. The new provision, that is, the one contained in the last act about making a higher charge for the use of the bridge, does not, as it appears to me, authorise the council to tax those persons who would otherwise be exempt from toll. I have very great doubt whether in fact the 30th section does apply at all to this case, notwithstanding the 59th section. The authority given in the 30th section is, that any company incorporated under the act, with the sanction of the municipal council of the county, may charge a higher rate of toll. Here the county itself is the proprietor of the road purchased from the government. If the road had been in the hands of a company, then the power of the council is that of an independent body sanctioning the higher charge, that body having no pecuniary interest themselves. But here the council is sanctioning its own authority to take the higher toll. I have much doubt whether the legislature intended that to be so in the enactment of the 30th section. The point, however, was not urged, and I have come to the conclusion (supposing the council to possess the power of sanctioning a higher rate to be taken by themselves upon the bridge) that it can only apply to those persons who are not exempted in any way, and I consider the 31st section does exempt the plaintiff, upon the facts of this case, from paying toll, although to go from his road, the Wortley road, to York street, he is obliged to cross their bridge, for the Wortley

road and York street, as respects the road in question, must be considered transverse roads. Reverse the question, and suppose some one living in the city wished to go to the Wortley road, it appears to me it must be held a transverse road, and they would be exempt from toll. It may be said, how can the gate-keeper know, without he watches people, whether they go merely from the Wortley road to York street or York street to the Wortley road? The answer to that is, they have put the gate in the wrong place, and have only put it where it is in order to compel those persons to pay toll who by law are exempt, for if they levy toll on those using the county road, it is easy enough to collect the toll for that road.

I think the plaintiff is entitled to enter judgment upon the verdict in his favour.

Judgment for plaintiff.

FULTON V. THE GRAND TRUNK RAILWAY COMPANY.

Railway Company—Refusal to pay fare—Action for putting plaintiff off the train—14 & 15 Vic., ch. 51, sec. 21, sub-sec. 6.

The plaintiff got upon the train without a ticket, and when asked for his fare declined paying then, as he said he had not made up his mind how far he should go. Defendant, the conductor, said he must decide, and afterwards, on his declining again on the same ground, stopped the train and put him out, at a place about a mile and a quarter from the last station and within half a mile of a house. The plaintiff at last tendered a \$20 gold piece, telling the conductor to take his fare, \$1.35, out of it.

Held, that the plaintiff had refused to pay his fare, within the meaning of the 14 & 15 Vic., ch. 51, sec. 21, sub-sec. 6, and that defendant was justified in what he did; and that the jury having found for the plaintiff, a new trial was granted without costs.

A case being at issue in the county court, was removed into this court by *certiorari*, and the plaintiff proceeded upon the pleadings as they stood, filing no new declaration, and entering no appearance above—*Held*, that defendants having gone to trial without objection, were not in a position after verdict to the irregularity.

ACTION for expelling the plaintiff wrongfully from the defendant's railway train, on which he was being carried by defendants as a passenger from Lancaster to Cornwall, he having offered to pay his fare.

Defendants pleaded not guilty, by statute 14 & 15 Vic., ch. 51, sec. 20, and 16 Vic., ch. 37, sec. 2.

The action was at issue in the county court, when it was removed into this court by *certiorari*. The plaintiff proceeded afterwards in this court upon the pleadings as they had stood in the court below, filing no new declaration or other pleadings, and no appearance in this court was entered for the defendants.

Notice of trial was served as usual. It was not shewn that the defendants made any application to set aside the proceedings as irregular, or intimated any objection on that account before verdict.

At the trial, at Cornwall, before *Richards, J.*, it appeared from the evidence that the plaintiff got on the train at Lancaster: that he came to the station there too late to purchase a ticket, and got hastily upon the train, and continued standing on the small platform in front of one of the cars: that after the train proceeded the conductor asked him for his fare, as he had no ticket, but he declined paying then, as he said he did not know whether he should get off at Cornwall or go beyond to Harrisburg: that the conductor told him he must make up his mind, and pay his fare: that afterwards the conductor, finding he would not comply with the regulations and pay his fare before he got to Cornwall, told him he must pay his fare to some certain place or leave the train: that the plaintiff at last tendered him a \$20 gold piece, and told him to take the change out of that, the fare being \$1.35.

A companion who was with the plaintiff swore that they two had been at a distance the night before, and had been in bed all the afternoon before going upon the train, but that the plaintiff was sober: that he and the plaintiff stood out upon the platform because the witness was smoking. The plaintiff persisted in saying that he would pay when he got to Cornwall, and buy a ticket there if he wanted to go further, saying that it was nothing to defendant if he did not decide before he got to Cornwall; but when he was being put off, or just after, he tendered the gold piece.

The place where he was put off was between one and two miles from Somerstown station, which they had passed on their way to Cornwall. The station-master there swore

that there was a dwelling-house about half a mile from where they stopped : that the plaintiff must have seen the light in the window of the house, but that he did not go to it.

The learned judge told the jury that he thought the conductor was not obliged to give change for the twenty dollar gold piece tendered to him ; but if the conductor peremptorily refused to receive the fare on other grounds, and not for that reason, he thought the plaintiff was entitled to recover, and he intimated his opinion to be that the plaintiff was entitled to recover, though if they thought the plaintiff's conduct was equivocal, not decided, that might be taken into consideration in giving damages.

The jury found for the plaintiff £27 10s. damages.

J. Bell (of Belleville) obtained a rule *nisi* for a new trial on the law and evidence, on the ground that the plaintiff had made no legal tender of his fare, and that the defendants were justified upon the evidence in putting the plaintiff off the train, or on the ground of surprise and discovery of new evidence ; or to set aside the verdict for irregularity, there having been no appearance entered by the defendants in the cause, nor any declaration or pleadings served, and because, the case having been removed by *certiorari* from the county court, the plaintiff was bound to begin *de novo*.—He cited Pickford v. Grand Junction R. W. Co., 8 M. & W. 372 ; Rawson v. Johnson, 1 East 203.

The defendants shewed that the conductor who put the plaintiff off the train was absent at Chicago when the trial took place, and that they did their best to find where he had gone to, but could not. The application was made on the part of the defendants to put off the trial on that account.

M. C. Cameron shewed cause.

ROBINSON, C. J.—I think the only question we have to deal with in this case is whether the verdict was right upon the evidence that was given. The defendants having themselves concurred with the plaintiff in going to trial upon the record of the proceedings as made up, and having made no

application on the ground of irregularity, but having accepted the notice of trial, and retained it without giving notice that they looked upon anything that had been previously done as irregular, are not in a situation to take objections to the previous proceedings.

And as to the affidavits of discovery of new evidence, and of the absence of material witness, I do not think that they lay sufficient ground for setting aside the verdict.

The defendants, if they thought the evidence of the conductor would have been material, should at least have attempted to have the trial put off until they could obtain him ; and in such a case as this the court would have been disposed, I dare say, to accede to the application on reasonable ground being shewn. The defendants must be supposed to have known what they had it in their power to prove at the trial, and seem to have relied upon its being sufficient, and as it appears to us not without good reason

The plaintiff's complaint is, that he was *wrongfully* put off the defendants' railway train in which he was being conveyed as a passenger from Lancaster to Cornwall, although he offered to pay his fare. The defendants having pleaded the general issue, as allowed by statute, gave the special matter in evidence under it.

The Railway Clauses Act, 14 & 15 Vic., ch. 51, sec. 21, sub-sec. 6, enacts that, " Passengers refusing to pay their fare may, by the conductor of the train and the servants of the company, be, with their baggage, put out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, as the conductor shall elect, first stopping the train."

In my opinion the plaintiff refused to pay his fare within the meaning of that clause when he failed to pay it upon being civilly asked for it, and that more than once, by the proper officer, and contented himself with saying that he had not yet made up his mind where he was going to, and that he would tell him when he got to some place ahead.

The conductor of the train has a right to know at once, not only whether the passenger is willing to pay his fare, but whether he can pay it; and if he could be put off in the

manner the plaintiff was attempting to do, the passenger could in any such case continue to be carried as far as he meant to go without paying his fare, or having any means to pay at all, and might, when the train arrived at any station where he chose to leave it, step out of the train and evade payment.

We see that when a railway train stops at any station every passenger feels himself at liberty to leave it freely, without waiting for the permission of any officer, or stopping till he can be released by one. This is a most convenient arrangement, both for the passengers and for the railway company, for by that means the passengers can depart instantly and without hesitation, and the company's officers are left at liberty to attend to the movement of the train, without having their attention distracted by looking after passengers in order to collect their fare. But this convenient method of doing business can only be provided by insisting rigidly on the passengers shewing their tickets or paying their fare at the proper time, which is when they are asked to do so.

Now here the plaintiff came too late to get a ticket, which is the regular course. That probably arose, as well as his unreasonable conduct afterwards, from his having been up all the night before, and having slept the next day till the train came, as his companion explained; but since he scrambled into the train in that hurried manner without obtaining a ticket, as people are expected to do, that ought to have disposed him to give no unnecessary trouble afterwards. His refusal to pay when asked, on the pretence that he did not yet know where he was going to, was inconsiderate and unreasonable, and it was trifling with the conductor to persist in that course when applied to a second time. If he had a right so to act, of course every other passenger could with equal right have done the same, and in that case a train would arrive at the next station without any one having paid for his passage, and without the conductor knowing whether any one was going to leave the train or not. This would leave the conductor perhaps with several cars full of passengers, and accounts to settle

with them all whenever they chose respectively to say that they intended to go no further. It would be impossible that the business on a railway train could be conducted in that loose way without manifest risk of accidents, because it would never be known how long they might be detained haggling with the passengers at the several stations, and one or more conductors would have to watch the passengers in every car. It is a matter in which the public are interested, that there should be no such impediment in the way to obstruct the prompt and regular progress of the train, because the conductors of it must keep their time, or the chance of collision with other trains is much increased, and the danger of other accidents, in consequence of the train having to be driven at greater speed in order to make up for such detentions.

The plaintiff tendering at last a twenty dollar gold coin in payment, either when he was about being put off or after he had been put off, makes no difference, I think, in the case, for that was not a reasonable offer to pay, which required more than eighteen dollars to be paid back in change. The general practice is for the passengers to pay at the office and get tickets. The officer attending there might reasonably object to an offer of a twenty dollar gold piece in order that one dollar and twenty-five cents might be taken out of it. If any or all of the passengers might put him to the trouble of giving back so much change as that, it would be impossible that the business could be transacted with the expedition which is necessary, or with proper caution, for there would be people probably who would soon take their chance of putting off counterfeit coin or bills, if they found that the officer was obliged to receive them under circumstances which did not admit of his taking time to scrutinize them ; and a person rushing into a car without a ticket has no reason to expect that he will find the conductor prepared to change a twenty dollar gold piece, for he relies upon receiving tickets from the parties, or if money is to be paid to him instead, that it will be paid with reasonable regard to what is convenient under the circumstances.

Then as to the plaintiff not having been put off at a station,

the statute does not require that, but allows the conductor in his discretion to put him off near any dwelling house ; and if the plaintiff had rested his right to recover solely upon that, it ought I think to have been left to the jury to say whether the plaintiff was not put off at a point reasonably near to a dwelling house under the circumstances.

The case, from the learned judge's notes of his charge, seems rather to have gone to the jury on other ground, for they were told that if they thought the plaintiff's conduct in regard to paying was equivocal and undecided, they might take that into consideration in allowing damages. The jury gave what seems to be very substantial damages under the circumstances ; and certainly I think that when the plaintiff did not do as all passengers are expected to do in regard to their fare, but instead of paying it acted equivocally and undecidedly, the conductor was entitled, if not called upon, to decide for him that he was not prepared to go any further upon the train, since he would not comply with the well understood practice. It was only by so acting that the officer could regularly remove the difficulty, and be at liberty to attend to the duties in the train.

I think there should be a new trial without costs.

BURNS, J.—This case appears to me important in respect to defining the powers given to the conductors and servants of railway companies, under the 6th sub-section of section 21 of the Railway Clauses Act, 14 & 15 Vic., ch. 51. It seems the plaintiff and a companion of his got on board the train at Lancaster, and it would seem from the cause of the train arriving there sooner than expected, the plaintiff could not obtain a ticket at that station. From the evidence of the station master the intention of the plaintiff was to have purchased a ticket for Morrisburgh, a place beyond Cornwall. After he got upon the train it seems he changed his mind, and instead of going to Morrisburgh he would go no further than Cornwall, but still was uncertain whether he would go to the one place or the other. The conductor received that excuse for the time, upon first asking the plaintiff for his ticket or the fare, and did not then exact

the fare, but left the plaintiff and his companion to decide when he should call on them again. The train after that passed another station, Somerstown, and after leaving that station, when the conductor again called upon the plaintiff for his fare, he still had not made up his mind where he was going, but said he would pay before the train arrived at Cornwall, and if he then intended going further he would purchase a ticket at Cornwall for Morrisburgh. The conductor began to think the plaintiff was only shuffling, and wished to avoid payment, and caused the train to be stopped, and the plaintiff was put off some mile and a quarter, or thereabouts, from the Somerstown station, but there were other houses about half a mile from the place where the train stopped. It was a dark and cloudy night, but the lights of the station visible. It seems after the plaintiff was about being put off the train he then offered a \$20 gold piece to the conductor from which for him to take the fare

I find no fault with the mode in which my brother Richards put the case to the jury as respects the liability of the plaintiff to provide himself either with a ticket from the station, or of his being obliged to furnish the exact amount to the conductor if the conductor insisted upon that, or whether the conduct of the conductor was such that it might be considered he altogether refused to carry the plaintiff, but I think he should not have told the jury that if the plaintiff's conduct as respecting the place where he would go was equivocal, it was a matter of merely affecting the damages, and that the plaintiff would be entitled to recover. I look upon such equivocal conduct not as affecting the damages merely, but as striking at the foundation of the action. If all the passengers on a train could act upon such a principle and did so, it would be utterly impossible to work a railway. The passenger must have an intention in his own mind where he intends going, either when he goes on board the train or when he is called upon for his fare by the conductor. It would be extremely unreasonable that the train should either be stopped before arriving at a station, in order that the conductor might ascertain how many of the passengers intended stopping,

and that they should pay their fare then, or that the train should proceed on to the station, and the conductor be left to take his chance of collecting the fare from those leaving it. The conductor in this instance seems to have acted good humouredly, and allowed the plaintiff time to make up his mind where he wanted to go ; but when he called upon him a second time, and was told that he still was uncertain, but would pay to Cornwall before he arrived there, and then would decide whether he would or not purchase a ticket to Morrisburgh, I think the conductor had some reason for thinking the plaintiff wanted, as the conductor said, to humbug him. I must say I think it is the duty of a passenger, so far as his fare to be paid is concerned, that his conduct should not be equivocal as to what place he wishes to go to. He may be as equivocal as he pleases as regards himself, and go as long or as short a distance as he likes, if he keeps that to himself, and does not inconvenience others by his conduct ; but when he is called upon to pay his fare he should at all events let the conductor know to what place he wishes to pay to, and also pay it, and not say he is uncertain where he will go, but will pay before he arrives at such place. The conductor might very well suppose from such conduct that his intention of going to Morrisburgh was all pretence, and that his real intention was that he should be carried to Cornwall, and when there, or if even put off near there, he would have been carried that distance at all events for nothing, and perhaps to the very place he wished to go.

It seems the night was dark and cloudy, but the lights of the station which the train had just before passed were clearly visible, and there was a house not more than half a mile from where the train was stopped ; and it does not appear there is any reason why the conductor might not elect to stop the train where he did.

I think there should be a new trial, without costs.

MCLEAN, J., concurred.

Rule absolute.

LEVISCONTE V. DORLAND.

Action against administrator—Plene administravit—Replication, lands—Rejoinder—Demurrer.

Action against an administrator. The defendant pleaded *plene administravit*, to which the plaintiff replied lands. Defendant rejoined that he could not deny but that the intestate died seised of lands; but that his heir at law, for a valuable consideration, conveyed all his interest to defendant: that at and before the death of the intestate one H. held a mortgage on said land to secure payment to him of £500, being the full value of said land, and that defendant did, to prevent costs against the estate, and for no other reason, and without any consideration, convey the equity of redemption to said H.

Held, on demurrer, rejoinder bad.

ACTION upon the common counts against the defendant as administrator of Enoch Dorland.

Plea—*Plene administravit*.

Replication—that it is true the said defendant had not at the time of the commencement of this suit any goods and chattels which were of the said Enoch Dorland at the time of his death, yet that the said Enoch Dorland died seised of divers houses, lands, hereditaments and real estate in Upper Canada; that the plaintiff is a natural born subject of Her Majesty, resident in the County of Hastings, and being such, that the said houses, lands, hereditaments and real estate, were at the time of the death of the said Enoch Dorland, and when suit brought, and still are assets in the hands of the defendant as administrator as aforesaid, and liable to satisfy the damages sustained by reason of the non-performance in the declaration mentioned.

Rejoinder.—That the defendant cannot deny but that the said Enoch Dorland did die seised of certain lands, hereditaments, and real estate in Upper Canada, to wit, part of lot No. 38, on the east side of Front street, in the Town of Belleville, in the County of Hastings; and that one Samuel Dorland, who was father and heir-at-law of the said Enoch Dorland, for a valuable consideration, to wit, the consideration therein mentioned, conveyed by deed all the right, title and interest, which he, as father and heir-at-law as aforesaid, then had, to him, the defendant; and the defendant says that before and at the time of the death of the said Enoch Dorland one George Eyre Henderson held a mortgage upon the said lands, hereditaments and real estate aforesaid, for

securing the payment to him, the said George Eyre Henderson, of a large sum of money, to wit, the sum of £500, being the full value of the said lands, hereditaments and real estate, and that the said defendant did, for the purpose of preventing the accumulation of costs accruing against the estate of the said Enoch Dorland, and for no other purpose, and without any further or any consideration to the defendant paid, conveyed by deed all his right, title, and equity of redemption to the said George Eyre Henderson, which he, the defendant, then held under and by virtue of the deed from the said Samuel Dorland, father and heir-at-law as aforesaid, of and unto the said lands, hereditaments and real estate as aforesaid, which were all the lands, hereditaments and real estate the said Enoch Dorland died seised of.

Demurrer, on the following grounds :

1st—That the said Samuel Dorland, as against a creditor of the intestate, could not legally dispose of the said lands as the intestate's equity of redemption.

2nd—Nor did said sale against Samuel Dorland to defendant of said lands or equity of redemption therein, as against creditors of the intestate, pass an interest in the same, so as to enable defendant to convey, as against said creditors, to said mortgagee of said lands, the said lands or equity of redemption.

3rd—That the said defendant had no legal right at the time he conveyed said equity of redemption to said mortgagee to dispose of lands, assets in his hands liable to satisfy intestate's debts.

4th—That said heir, as against creditors, had no right to dispose of said lands to said defendant, or said mortgagee, being assets in defendant's hands liable to satisfy the debt due in this cause by intestate.

5th—That defendant confesses that he paid said heir a valuable consideration for said equity of redemption, but does not allege that said mortgage was all due and unpaid at the time he conveyed to the mortgagee, and therefore does not void the presumption that said valuable consideration might not have been a sum over and above the amount of the mortgage sufficient to pay the plaintiff's claim.

M. R. Vankoughnet, for the demurrer, cited *Seaton v. Taylor*, 3 U. C. R. 303 ; *Doe McIntosh v. McDonell*, 5 O. S. 195.

Richards, Q. C., contra, cited *Sickles v. Asselstine*, 10 U. C. R. 203.

ROBINSON, C. J.—The pleadings bring before us these facts. The defendant Peter Dorland is administrator of Enoch Dorland, and is sued as such in this action. *Plene administravit* is pleaded by him, and the plaintiff replies, not denying that the goods were fully administered, but averring that Enoch Dorland died seised of lands against which he desires to have execution.

The defendant rejoins that Enoch Dorland died seised of certain real estate, which he describes, and of no other ; that that estate devolved at his death upon Samuel Dorland, his father, who conveyed it to the defendant (brother of Enoch Dorland) for a valuable consideration : that the property before Enoch Dorland's death was mortgaged to one Henderson for a large debt, viz., £ 500, which was its full value : that the defendant to prevent costs to the estate, and not for any other consideration, conveyed to Henderson all his right and equity of redemption in the estate, which he took from Samuel Dorland as heir of Enoch Dorland.

He does not allege that no part of the debt to Henderson had been paid before he made such conveyance ; and it is not stated at what time any of these transactions took place.

By statute 12 Vic., ch. 73, an equity of redemption is made saleable under a writ of *fiery facias* against lands.

I observe the statute in the first clause provides only for the equity of redemption being sold upon an execution against the real estate *of the mortgagor*. This judgment is against the real estate not of the mortgagor, nor indeed is it stated in the rejoinder who the mortgagor was, so that we cannot tell whether the judgment is or is not against his heir, executor, or administrator ; but it is stated in the rejoinder that Enoch Dorland died seised of the estate specified, and that while he was so seised, and at the time of his death, one Henderson held a mortgage upon the

estate. Whether that was a mortgage in fee or for years is not stated. It may have been a mortgage in fee, for nothing to the contrary is stated. When Enoch Dorland died the equity of redemption went to his father, who was his heir and he conveyed it to the defendant.

According, therefore, to the statements in the rejoinder, Enoch Dorland must have died seised of the equity of redemption, and whether he died before or after the 12 Vic., ch. 73, was passed he does not tell us. We may assume against him that it was after, in which case a judgment and execution against him or his administrator would have attached upon it, and it would not have devolved upon his heir otherwise than subject to such execution. I refer on this point to the case of *Gardiner v. Gardiner* (2. O. S. 520).

The plaintiff is entitled to his execution against the real estate of which Enoch Dorland died seised upon this judgment against his administrator, according to the decision in *Gardiner v. Gardiner*, which has been acquiesced in and acted upon for nearly thirty years; and I suppose we must understand by the interpretation clause of the statute 12 Vic., ch. 73, that the equity of redemption, which under that act might have been sold under an execution against the real estate of the mortgagor, may be sold under a similar execution against the real estate of which his assignee died seised. Enoch Dorland must have taken the equitable estate, either as the heir or assignee of the mortgagor, though it is not explained how, or by how many devolutions or assignments, for we are not even told who the original mortgagor was.

This being so, his administrator can have done nothing which can obstruct the right of the plaintiff to have execution against the equity of redemption or other real estate of which Enoch Dorland died seised, for the heir of Enoch Dorland could not by his conveyance to the defendant prevent the creditors of Enoch Dorland from having their debts satisfied out of the real estate, and it becomes of no consequence to consider what Enoch Dorland did after he received the conveyance.

It may be true that the mortgage, if it is wholly unsatisfied,

may amount to as much as the value of the land, and the equity of redemption may be worth nothing, and may produce nothing if seized in execution ; but the plaintiff is entitled nevertheless to endeavour to obtain satisfaction from it, and I do not think there is any thing set up by the defendant that should prevent the plaintiff having judgment, in order that he may take out an execution against lands if he thinks fit.

The defendant should have allowed him to take judgment when he admitted the plea of *plene administravit* to be true, and when he only asked for judgment in order that he might obtain execution against lands. The defendant has nothing to do with the real assets, and need not concern himself in the question whether there are such assets or not.

The defendant does not state in his rejoinder at what time he became seised of the equity of redemption, or when he conveyed it to Henderson. It might, for all that appears, have been before this action, or before there was any one representing the estate against whom an action could be brought.

The plaintiff, I think, should have judgment upon his demurrer to the defendant's rejoinder, for the plaintiff having admitted that the goods have been fully administered only desires judgment in order that he may have execution against the lands of which Enoch Dorland died seised ; and the defendant as administrator cannot obstruct him in obtaining such execution, and has no interest in the question whether there are lands or not.

The same question has been so often decided that the point can no longer be considered open in this court.—*Sickles v. Asselstine*, 10 U. C. R. 202.

BURNS, J.—After so many decisions on replications framed as in this case by way of answer to the plea of *plene administravit*, it is impossible to say such a replication ought not to be used. The difficulty is with respect to the answer which the defendant may give to the replication. The executor has nothing whatever to do with administering lands in order to satisfy his testator's debt's,

unless the power be given by will to do so. That lands are made available for such purpose, through the medium of a judgment against the executor or administrator, arises from the decisions upon the effect of the statute 5 Geo. II., ch. 7. It has always struck me that the preferable mode of getting at the lands through such a judgment would have been to have permitted the plaintiff to enter a suggestion on the roll as an answer to the plea of *plene administravit*, instead of a replication calling upon the defendant to rejoin. I cannot call to mind a single instance where a defendant has been successful in rejoining to such a replication, and that must arise from the fact already mentioned, that the executor or administrator has nothing whatever to do with administering the land. (a) I suppose, however, as such a replication has been allowed, the defendant might traverse it if he thought proper; but then, he having no interest in the question whether his testator or intestate had lands or not, would never take that course, unless he knew beyond all doubt that there were no lands, for if he failed upon the issue, the effect, I apprehend, would be that he would himself be liable for costs.

A case like the present could not have arisen before the statute 12 Vic., ch. 73, for an equity of redemption could not be sold upon an execution against the lands of the mortgagor. Under this statute such an interest may now be sold; but the question presented by the rejoinder in this case is whether such an equity of redemption be assets liable to be sold upon a judgment which may be obtained against the executor of the mortgagor. It seems that the heir in this case has sold and conveyed the equity of redemption. Our courts have held that a judgment against the executor or administrator, with a sale of lands thereupon, effectually transfers the land, and that the title which the heir acquires is subject to be defeated by such a judgment. I take the effect of the statute 12 Vic., ch. 73, to be that it is not merely confined to selling the equity of redemption upon executions which may issue against the lands of the defen-

(a) See, however, *Topping et al. v. Yardington et al.* 6 C. P. 347.

dant in the suit. The words are, that it shall and may be lawful, upon any writ of *fiery facias* lawfully issued against the lands and tenements of any person or persons, who or any of whom may be a mortgagor of real estate, for the sheriff to seize and take in execution the equity of redemption. This does not confine the writ to sell an equity of a personal defendant in a suit, but extends to sell in all cases where a writ of *fiery facias* may lawfully issue against the lands of any person or persons. If therefore it were lawful to sell lands of a testator upon a judgment against the executor previous to the passing of the statute, as our courts have decided that it was, I think it must follow that in such cases the equity of redemption which the testator had can be sold. It would be singular to hold that the fee simple of the land of the deceased might be sold, and that the equity of redemption he had could not.

The fact disclosed in the rejoinder, that the heir has already sold the equity of redemption, is no answer to the replication that the defendant's intestate died seised of it. Judgment should be for the plaintiff.

MCLEAL, J., concurred.

Judgment for plaintiff on demurrer.

READ BURRITT V. ALEXANDER HAMILTON, JAMES BALLANTINE, THOMAS BROWN, JOHN BALLANTINE, THOMAS SMITH, HUGH M. BYERS. ALEXANDER ROBERTSON, AND JAMES SIMPSON.

Contested election—Fees for taking evidence—Action for by commissioner—Recognizance—14 & 15 Vic., ch. 1—20 Vic., ch. 23.

Held, Burns, J., dissenting, that a county court judge acting as commissioner to take evidence in a contested election, under 20 Vic., ch. 23, sec. 6, could not maintain an action for his fees, either against all who petitioned against the return and appeared before him as active parties in the case, or against the one on whose request he acted; but that he was restricted to his remedy under there cognizance.

Quære, whether one of several defendants may be stricken out at the trial without his consent or that of those remaining.

This was an action brought by the plaintiff, the judge of the county court of the county of Perth, under the statutes 14 & 15 Vic., ch. 1, and 20 Vic., ch. 23, to recover from de-

fendants the sum of twenty-six pounds and interest, claimed in the declaration to be due to him for money payable by the defendants to the plaintiff for fees, wages, remuneration, and emoluments, as commissioner acting under the Election Petitions Act of 1851, "in the matter of the controverted election of Thomas Mayne Daly, the person proclaimed or returned as being elected a member of the Legislative Assembly for the county of Perth at the last general election for the said county of Perth, for the services by him, the said plaintiff, rendered as such commissioner; and for the time during which he was necessarily engaged on the said commission of enquiry, and in taking the evidence of the matters of fact mentioned in the notice of the defendants, the contesting parties in the said controverted election; and on the matters of fact mentioned in the answer of the said Thomas Mayne Daly, the member elect thereto, and at their, the defendants', request; and for the travelling expenses, at the rate of one shilling per mile necessarily travelled by the plaintiff from and to his usual place of abode, in his attendance on said commission of enquiry, and in the taking of the said evidence, and at their, the said defendants', request; and although the select committee appointed by the commons house of Legislative Assembly on said petition, have made their final report to the said house and on the merits of the said petition, yet the defendants have not paid the said sums or any part thereof; and for work done and materials provided by the plaintiff for the defendants, at their request; "and for money found to be due from the defendants to the plaintiff, on accounts stated."

The defendants pleaded "Never indebted," on which issue was joined.

Upon the trial, which took place at Stratford, before *Robinson*, C. J., the defendants' counsel admitted all that was necessary for authorising the issuing of the commission; also the report made by the plaintiff of the evidence taken, and the length of time he had been occupied in executing the commission.

The plaintiff charged for his services	£26	0	0
And interest	0	15	6
That is, nine days £2 10s. a day	£22	10	0
And one day comparing and certify-			
ing evidence	2	10	0
Twenty miles travelling	1	0	0
	<hr/>		
	£26	0	0

The petition to the assembly against the election and return upon which the commission issued was drawn up in the names of these eight defendants and one James Robertson, stated in the petition to be duly qualified electors who voted at the election, and was signed by the nine petitioners, and dated 10th of February, 1858.

A recognizance was entered into under the act, in the terms given in schedule A. appended to the act, by Thomas Brown (one of the defendants), and by one Robert Ballantyne, senr., for the payment, among other things, of all costs and expenses which should become payable "to any person who, upon the application of such petitioners for the issue of a commission to take evidence, or on the taking of evidence under any commission, on the trial of the said election petition, shall be appointed commissioner for that purpose."

On the 29th of January, 1859, Thomas Brown (one of these defendants) signed a petition addressed to the plaintiff as judge of the county court, as follows: "I, Thomas Brown, one of the petitioners or intending petitioners against the election and return of Thomas Mayne Daly, Esq., as a member of the Legislative Assembly for the county of Perth, hereby make application to him, and hereby require him to take the evidence upon the matters of fact mentioned in the notice served upon the said Thomas Mayne Daly, Esq., and in the answer of the said Daly, who has been declared elected."

This petition was signed by Thomas Brown only.

The committee which tried the contested election determined in favour of the sitting member, and that the petition against his return was not frivolous or vexatious.

It was proved at the trial that one McDougall attended

at the examination of the witnesses before the county judge, and managed, as he said, for the petitioners : that the defendants were the persons who got up the commission : that all of them attended on the first day of the examination (as a witness swore he believed), but that on subsequent days only some of them attended, McDougall acting in the matter for them.

It was objected, that as Brown alone had petitioned for the commission, he alone could be held liable for the expenses, and that no authority was shewn to have been given to him to bind the other defendants, if he had assumed to do so; also, that the plaintiff could bring no action for his remuneration, for that the only remedy was through the recognizance.

The learned Chief Justice held, that admitting that an action could be brought under the 130th section of the 14 & 15 Vic. ch., 1, against those who had applied for the commission, yet it could only lie against Brown, who signed the application to the county judge.

Application was then made at the trial to strike out the names of the other defendants.

The learned Chief Justice doubted whether he could do so under the Common Law Proceedure Act, without either their written consent or that of the defendant Brown.

A verdict was then taken for the plaintiff, for £26 15s. 6d., subject to the opinion of the court as to whether the remedy was confined to the recognizance; and if not, whether there was sufficient evidence against any of the defendants but Brown.

If all the names of the defendants but Brown's, or any of the names, could have been struck out at the trial without their consent or that of the other defendants, then it was agreed that they might be struck out by the court, and the verdict entered against Brown alone, or such of the defendants as in the opinion of the court might be liable upon the evidence given.

Christopher Robinson, for the plaintiff, cited *Greaves v. Humphries*, 4 E. & Bl. 851; *Johnson v. Goslett*, 18 C. B. 736; *Wickens v. Steel*, 2 C. B. N. S. 488; *Robson v. Doyle*, 3 E. & Bl. 396; *Broom Com.* 674-5; *Wilkes v. Town Council*

of Brantford, 3 C. P. 470; Willoughby v. Willoughby, 4 Q. B. 687; Goody v. Penny, 9 M. & W. 687.

C. S. Patterson, for defendant.

ROBINSON, C. J.—As to the propriety of granting the amendment, I do not see that if we follow the language of the two clauses of the Common Law Procedure Act, 68 & 70, we can properly amend at the trial, by striking out the name of a defendant improperly joined, any more than of a plaintiff, without having the consent of the defendant to be struck out, given either personally or in writing; and in the last edition of Mr. Roscoe's work on Trials at Nisi Prius, page 92, he seems to look upon such consent as being necessary for that amendment, and mentions the names of the commentators on the act who have taken that view of it. It is clear, too, that Mr. Finlayson, another commentator upon the English Common Law Procedure Act, considered that to be the effect of the two clauses in that act which are exactly similar to ours. I refer to his note (a), upon the 37th clause of the English act of 1852. The case of Johnson v. Goslett (18 C. B. 728), and of Greaves v. Humphries (4 Ell. & Bl. 851), nevertheless seem to sanction the granting such an amendment at the trial without obtaining the consent of the defendant whose name it is desired to have struck out; but they are not altogether satisfactory authorities upon that point, because that was really not the question upon which the propriety of the amendment in either case turned; and the latter of the two cases, if it has been correctly reported, bears marks, I think, of its having been too hastily decided. The defendants' counsel in this case, however, has conceded that the amendment might have been made in this case at the trial, and does not object to it, if terms are imposed of making the plaintiff pay the costs of the defendants to be struck out, though it is admitted that these defendants were made parties without their consent.

Upon the other point. The application made by Brown to the plaintiff, as a judge of the county court, to take evidence to be used in the trial of the contested election in this

case, as well as the services rendered by the plaintiff under it, were subsequent to the passing of the act 20 Vic., ch. 23; and the 6th section of that act expressly puts the county court judges, while acting under this statute, in the same situation in regard to their remuneration as if they or he were acting as commissioners under the Election Petitions Act, 14 & 15 Vic., ch. 1. The 10th & 15th Sections of that act, and the form of recognizance given by the 10th section; also the 130th and following sections to the 150th, provide the remedy for enforcing the payment of the remuneration to the commissioner for taking evidence, as well as the other expenses attending the trial of the contested elections. Reference must be had especially to the 130th, 133rd, 139th, 141st, 143rd, and 147th sections.

We must then consider the principle of law stated in the case of *Stevens v. Jeacocke* (11 Q. B. 731), and in *Doe dem. Bishop of Rochester v. Bridges* (1 B. & Ad. 859), namely "that where an act of parliament creates an obligation, and enforces the performance of in a specific manner, there performance cannot be enforced in any other manner."

If the 130th section were the only provision in the act respecting the remuneration of the commissioner, then it would be clear that an action would lie upon that clause at the suit of the commissioner against the person who applied for his appointment, if not indeed against those who were acting with him in the contest, to recover the remuneration which that clause assigns; but when we consider that clause in connexion with the 133rd, 139th, and 143rd sections, I think we must conclude it to have been the intention of the legislature that under the 130th clause the amount of remuneration should be fixed, and the right given to demand it from the party liable, in order that if upon a proper demand made that amount should not be paid by the party liable, a breach of the recognizance might by such demand and refusal or neglect be established, with a view to such proceedings upon the recognizance as are directed by the subsequent sections of the act.

I think that the 143rd clause gives to witnesses a remedy under the recognizance for their expenses, and the 133rd

clause extends the same remedy to the commissioner who claims remuneration for his services.

The plaintiff's counsel referred to the case of *Goody v. Penny* (9 M. & W. 687), where an action for tolls was sustained on behalf of commissioners for improving a navigation, although the same statute on which the action was founded gave power to seize and detain the ship or goods in respect of which the toll was chargeable. But there the statute expressly gave a right of action in the name of the clerk of the commissioners for tolls made payable to them, and where the commissioners, trusting to the party for paying the tolls on demand, should in that confidence let the vessel pass on, they would lose all remedy if they were not allowed to sustain an action.

In any case, under the 14 & 15 Vic., ch. 1, before witnesses can enforce their claim, their expenses must have been taxed by the speaker, according to the 139th clause; and although that clause makes no mention of the commissioner who may be employed in taking evidence, and though his allowance per diem is fixed by the statute, and does not in that respect require to be taxed, yet the 133rd clause gives to the commissioner the like remedy upon the recognizance as is given to witnesses; and though the rate per day is fixed in this case, yet the time for which he is entitled to charge requires to be ascertained, and in that respect taxation of his charge does seem to be necessary as much as in the case of witnesses.

The defendant Brown, who applied to the judge to take the evidence, is one of those who entered into the recognizance to pay the costs. A clear remedy upon the recognizance lies against him upon the express words of the condition; and though I cannot say I have been without doubt upon the question, for the statute is not clear as it seems to me upon this point, the conclusion I have come to is that he must have his allowance taxed by the speaker before he is in a condition to enforce its payment; and his remedy is under the recognizance; and that he is no more at liberty to go before a jury with his claim in a separate action, and without having the amount due to him ascertained by pre-

vious taxation, than a witness would be for enforcing payment of his expenses.

The 141st section of 14 & 15 Vic., ch. 1, appears to me to refer to the parties contesting the seat, and to the sitting member : in other words, to whichever of them may be entitled by the result to tax the whole costs against the other.

In my opinion, there was no legal evidence in this case to shew any of the defendants liable except Brown ; and I do not think the plaintiff could recover in an individual action against him, not founded on the recognizance, and without shewing that the sum which he claims had been taxed to him by the speaker, and I think therefore that a nonsuit should be entered.

MCLEAN, J.—By the 10th section, 14 & 15 Vic., ch. 1, it is provided that security for costs must be given before a petition can be presented complaining of an undue election or return, and by the next section there is a similar provision for granting security by a sitting member before any commission will issue to take evidence. By the 14th section recognizances for payment of costs are required to be entered into before a justice of the peace or the speaker of the Legislative Assembly. The 98th section provides for the appointment of a commissioner, and it authorises the appointment of a circuit or county judge as such, and the power and duties of a commissioner are stated in subsequent sections of the act ; and amongst the powers given is the employment of clerks and bailiffs to aid in procuring the attendance of witnesses, and to take their testimony, and other duties connected with the objects of the commission. The remuneration of the commissioner and officers, and of bailiffs employed by the commissioner, is prescribed by the 130th and 132nd sections, and by the next section a remedy is provided for the commissioner, and all parties interested, on the recognizances. The speaker is authorised to ascertain the amount of costs, and his certificate of that amount is conclusive. That certificate is, I think, essential in all cases, and seems to have been intended by the legislature as proof of taxation and allowance, so that no difficulty could afterwards be

raised as to the amount actually payable. To be conclusive, it must necessarily include all costs, including such as may have been incurred for services by any commissioner, whether a county judge or other person, or by a clerk or bailiff, or other person authorised to be employed in the matter of any contested election. It cannot be supposed that the speaker was intended to ascertain the costs of each of these parties separately, and to give to each a certificate of costs due to him, for the act only provides for one certificate to be given after the costs have been ascertained ; and when that has been given, the commissioner and other officers have a remedy on the recognizances for their respective amounts. Then by the 143rd section, if these costs are not paid within the periods mentioned, the recognizance may be estreated, so that a mode of collection of any amount contained in the speaker's certificate is provided, and a time prescribed within which the amount must be paid, or the recognizance will be liable to be estreated.

By the 20th Vic., ch. 23, to improve the mode of obtaining evidence in cases of controverted elections, the judge of a county court may be applied to by any party, on production of a copy of a petition against the election and return of any member, together with a recognizance and affidavit of the sufficiency of the sureties therein, to take the evidence within his county in the matter of any contested election ; and when so applied to, and such vouchers are furnished, then, under the 6th section, the judge so applied to shall be deemed to all intents and purposes a commissioner for enquiring into, examining, and taking evidence upon all matters of fact and circumstances mentioned in the notice of the contesting party, or the answer of the returned member. By this provision parties are relieved from the necessity of applying to a committee, and are spared the delay of such a proceeding for the appointment of a commissioner, and the recognizance for costs may be transmitted by the commissioner to the clerk of the Legislative Assembly before a petition is actually presented to the house. By the 5th section it is declared that such *recognizance* shall *avail*, and be *estreated or enforced* accordingly, in default of payment by

the contesting party of *any costs incurred* by reason of such application as aforesaid, *whether such contesting* party shall *petition against the return* of the member so elected or otherwise.

By this provision it appears that the costs of any proceedings by a county judge in consequence of any application authorised to be made to him to take evidence under that section were intended by the legislature to be collected in case of default of payment by estreating or enforcing the recognizance, previous to which such costs must be ascertained by the speaker under the 139th section of 14 & 15 Vic., ch. 1. The mode provided for ascertaining costs, and for enforcing payment by the *estreat* of the recognizance, seems to me to have been intended as the only mode in such cases; and that mode is certainly preferable, and attended with less annoyance and vexation than if each party who rendered any service as commissioner, clerk or otherwise were left at liberty to sue for any amount which he might think proper to claim.

Considering that the plaintiff's only remedy is on the recognizance, it is unnecessary to enquire whether, if the action were maintainable against some of the defendants, the names of the others might be struck out on the trial. The cases cited, however, appear to shew that such a course might properly have been adopted, if necessary.

BURNS, J.—I think all the defendants liable in this suit to pay the plaintiff the amount of his bill. Under ch. 23 of 20 Vic., it is compulsory upon the judge of the county court to take evidence when any of the parties shall be desirous of taking evidence respecting the facts and circumstances alleged in the notice to be served on the sitting member. It seems all the defendants united in signing the notice to the sitting member of what they complained of, and the defendant Brown was the one who required the judge of the county court to take the evidence. In doing so he says he does it as one of the petitioners, and the judge is required to take such evidence upon the matters of fact mentioned in the notice served on the sitting member.

The sixth section of the act enacts that as soon as the application shall be made the judge shall be deemed to all intents and purposes a commissioner, &c., and shall have all the powers and rights, including remuneration for his services, &c., as persons appointed under the Election Petitions Act, 14 & 15 Vic., ch. 1.

The question is, whether an action could be maintained under this last act, or whether the only remedy is upon and under the recognizance entered into.

The 130th section says, that every commissioner, after the select committee shall have made their final report on the merits of the said petition, shall be entitled to demand and receive from the party or parties interested or concerned in such election petition, upon whose application such commissioner shall have been appointed, certain fees enumerated. The 133rd section provides that the commissioners, &c., shall have the like remedy upon the recognizance required to be entered into for their services in the execution of such commission as is given to any persons summoned as witnesses by such petitioner. I do not think, however, it is compulsory upon the judge to take this method, for I look upon that provision as an additional remedy to the liability of the party under the 130th section. The 139th section shews how a witness may procure his fees to be taxed, and under the subsequent sections it appears how the payment may be enforced. I apprehend it never could be sustained that a witness must attend without being paid in the first instance, and take his chance and all the trouble and inconvenience of collecting his proper expenses by that mode, unless indeed he were ordered to attend by the house.

A witness may refuse, I take it, to leave home without his expenses being paid, where required by a party, as in any other case; and I see nothing to prevent his suing the party causing him to appear, unless indeed the order proceeded from the House of Assembly. In such latter case, the recognizance affords the house the means of remunerating witnesses or reimbursing the contingent expenses. I see no reason, where the contest going on is between a petitioning body on the one side and a defendant on the other, that there

should be any difference between proceedings of this nature and in the ordinary cases in court. The recognizance is not a substituted liability for that of the party interested or concerned in the election petition, but an additional security for protection to all concerned. The condition of the recognizance in this case shews that, I think, to be so, for it is that these very defendants, naming them, shall well and truly pay all sums of money, costs and expenses, which shall become payable by them in respect of the election petition signed by them, under the Election Petitions Act of 1851, or under any other act.

Looking at the 139th, 140th, 141st, 142nd and 144th sections, the true meaning, I think, with respect to taxing costs, giving certificates to the persons entitled to be paid the different amounts, the estreating of the recognizance in case the parties liable thereon do not pay, all contemplate where the steps taken and ordered are done by the committee or the house ; but that where the parties themselves set the judge in motion the judge may claim his statutable remuneration from them at once, and that he is not bound to wait, or to look after his fees being allowed and taxed, &c., as he might be if he acted by the directions of the House of Assembly, and not upon the requisition of the parties interested.

With respect to the liability of the whole number of defendants or only of Brown, who alone signed the requisition to the judge to take evidence, it does not seem to me there can be any question. I do not think that the notice to the judge required to be signed by all the parties ; one of them would be sufficient for that purpose. All the defendants signed the petition, and the notice to the sitting member, and it appears they were all present, at least part of the time, while the examination before the judge was going on. Now the 130th section of the act speaks of the commissioner being entitled to demand and receive from the party or parties interested or concerned in such election petition the fees specified. The plaintiff in this instance would have instituted no inquiry upon the mere paper signed by the defendant Brown. It was necessary to file

with the judge a copy of the intended petition, as also a copy of the notice of the sitting member, as the groundwork of his proceedings. In these documents the judge sees that all the defendants form the party interested and concerned in the election petition, and he did quite right to act upon the requisition of any one of them in taking the evidence upon it, for he was not taking the evidence for that person alone, but for the party promoting the proceeding on the petition and notice.

I think judgment should be given for the plaintiff.

Judgment for defendants : BURNS, J., dissenting (a).

HARPEL V. THE MUNICIPALITY OF THE TOWNSHIP OF PORTLAND.

Arbitration on opening road—Publication—Second award—Proof of by-law—Declaration—Arrest of judgment.

Action against a municipal corporation upon an award in favour of the plaintiff for land taken from him for a road.

It appeared that the plaintiff named one arbitrator, H., and the reeve another, S.; and they being unable to agree upon a third, the county court judge appointed one B. B. and H. on the 30th of June signed the award sued on, giving £40 to the plaintiff. Afterwards the council called another meeting of the arbitrators, when all three attended, and B. and S. afterwards executed another instrument as their award, by which the plaintiff was to have only £3 10s.

Held, that the first award was good, and the plaintiff entitled to recover upon it :—that under the 16 Vic., ch. 181, sec. 33, it was sufficiently published when it was signed by the arbitrators; that defendants having appointed an arbitrator, it was unnecessary to prove and by-law for opening the road: that an action was clearly maintainable upon such an award; and that it was no objection to the declaration that it was upon a submission to the arbitrators while two only executed the award, for the statute authorises two to act.

DECLARATION for money payable by defendants to plaintiff upon an award made by virtue of a submission between the plaintiff and defendants, of and concerning a road run across the plaintiff's land, viz., lot, &c., and the damages to be paid by defendants to plaintiff therefor; and by virtue of which reference two of the arbitrators named in the submission awarded £40 damages to the plaintiff.

Pleas—1. Never indebted. 2. That the two arbitrators

(a) This case has been appealed, and now stands for judgment in the court above.

named, Booth and Harpel, did not make such award of and concerning the matters in difference so referred as aforesaid, in manner and form, &c.

At the trial, at Kingston, before *McLean*, J., it appeared that on the 10th of April, 1858, Harpel, the plaintiff, gave written notice to the reeve, clerk, and municipal council, that he had nominated Samuel Harpel (his brother) as his arbitrator to arbitrate as to the damages due to him on opening the road in question through his land.

It was admitted that one Spike was appointed by the reeve as the arbitrator on the part of the defendants: that he and Samuel Harpel could not agree on a third arbitrator, and on the 14th of June, 1858, the judge of the county court of Frontenac appointed Joshua Booth third arbitrator (by writing, in which he refers to by-law 64), "after hearing counsel for parties."

Booth and S. Harpel went and examined the ground. Spike did not attend. It was not proved whether he had or had not been notified of the meeting, as the others were, by the township clerk. They signed a paper by which they awarded that the plaintiff was justly entitled to £40 for the land taken for the road, and they directed that the council should pay to each of the two arbitrators £1 for his services. This award was dated the 30th of June, 1858, drawn up in form, clearly as if intended to be their award, and signed by Booth and Harpel.

Samuel Harpel swore upon the trial that Booth and he made this award, which was kept by Booth: that afterwards another meeting of the arbitrators was called by the council, and all three attended and were sworn. It did not appear whether Booth and Harpel had before been sworn or not, but he stated that when he and Booth made what he called their award, they had no agreement about meeting again: that he refused to give in any award different from the one he had made, but did not object to joining the two others in making an award like the former.

One David swore that he went with the plaintiff to Booth to get the award of the 30th of June, when Booth said he had given it to the township clerk to be filed.

Booth's account of the matter was, that when he and Harpel met and considered the matter, they made what he called a memorandum of the proceedings, of which he produced a copy, the same that the plaintiff relied upon as the award sued on; the original of this Booth still kept in his possession. He swore that the award which he told the witness David was in the hands of the county clerk was not this paper of the 30th of June, but another which he and Spike afterwards made: that all three met after the 30th of June and heard evidence, and he and Spike made an award, in which Harpel did not join. He swore that the paper of the 30th of June was not delivered, but that another paper duly executed as the award was made by him and Spike as their award on the 10th of July, 1858, by which they awarded £3 10s. as the compensation to be paid.

This award was produced. It was signed and sealed by Spike and Booth, and was drawn up in due form, and recited a by-law establishing the road. It recited that they had been attended by the parties and the witnesses. It recited also that the three arbitrators met on the 10th of July, and were sworn, and investigated the matter, and that James Spike and Joshua Booth made this award, not stating why the other arbitrator did not execute.

Booth swore that the first paper was cancelled, and that the arbitrators were to meet again, and that he gave that answer to the plaintiff when he came and asked for it.

It was objected for defendants: 1st. That there was no proper publication of the award. 2ndly. That there was no proof that any by-law was ever passed by the council to lay out the road. 3dly. That there was no remedy by action given by statute in the case of such awards. 4thly. That the judge of the county court had no power to appoint a third arbitrator.

The learned judge held that the paper of the 30th of June was upon the face of it a good award, and that the two arbitrators having made it, there could be no second award made; and he told the jury that the plaintiff was entitled to recover upon it. The jury found for the plaintiff £40.

Smith, Q. C., obtained a rule *nisi* to enter a nonsuit,

pursuant to leave reserved, on the objections taken at the trial, or to arrest the judgment, on the ground that the declaration was on a cause of action founded on a submission to three arbitrators, while only two made the award.

Phillpotts shewed cause.

ROBINSON, C. J.—As to the objection that there was no publication of the award, the statute 16 Vic. ch. 181, section 33, under which this arbitration took place, gives no particular direction in regard either to publication or delivery. It says only that *any award made by a majority of the arbitrators* shall be as binding as if the three arbitrators had concurred in it and made the same, and it subjects the award to the jurisdiction of any of the superior courts of common law, in the same manner and to the same extent, for all purposes, as if there had been a submission by bond containing an agreement that such submission should be made a rule of either of the said courts.

I think the award sued upon was published when it was signed by the parties, being such a document upon the face of it as determined all that was submitted to them. The statute 9 & 10 Wm. III., ch. 15, provides that the time for moving to set aside an award shall begin to run after the award is made *and published to the parties*; and what should be considered a *publication to the parties*, within those words of the act, has in many cases been made a question. There is now no such question before us, for there is no motion before us for setting aside this award under the statute, but the question is merely whether what is sued upon as an award was proved to have been an award *made*, (for that is the only expression used in our statute) in such a manner as to be binding.

Mr. Russell, in his excellent treatise on Awards, page 243, states that "so far as the validity of the award is affected, it will in general be considered as published as soon as the arbitrator has done some act whereby he becomes *functus officio*, and has declared his final mind, and can no longer change it: that is, as soon as he has made a complete award." That was the language of the court in *Brooke v. Mitchell*, (6 M. & W. 473.)

The second objection is that there was no proof of any by-law passed by the municipality for laying out the road.

The defendants, I think, are in no situation to raise such an objection, having themselves appointed an arbitrator, and having gone before the judge of the county court upon an application to appoint a third arbitrator.

The next objection is, that there is no remedy by action against the municipality for enforcing an award in any such case. I think it is the only remedy, unless perhaps the end might be obtained through a *mandamus*, and at least it is the most obvious and proper remedy, though it is true that the statute does not expressly provide that the corporation may be sued for non-performance of the award. An award legally made under the act certainly creates a debt, and we are in the constant habit of entertaining actions against similar municipalities for the recovery of legal demands against them.

I do not see upon what ground the authority of the judge of the county court to appoint a third arbitrator is denied by the defendants. That, however, was one of the objections, and was the last on which the defendants moved for a nonsuit.

The defendants have moved besides to arrest the judgment, on the ground that the declaration is upon a cause of action founded on a submission to three arbitrators, while two only executed the award. That would really be no ground for arresting the judgment, for we are bound to notice that by the statute the award may be made by a majority of the three. The award of the 30th of June was indeed drawn up as if it were the award of three, and, I suppose, under the supposition that the three would sign; but being made afterwards by two only, and two being competent to make an award, there is nothing fatal in the circumstance that two only executed an award, which on the face of it professes to be the award of three.

The case of *White v. Sharp* (12 M. & W. 712) was one precisely like the present in that respect, and the court held that there was no ground, for objecting in that account. The court said, "It is nothing more than a misrecital of a fact, and the award is not less the award of the two."

In my opinion the court cannot properly order a nonsuit to be entered on any of the grounds on which it has been moved, nor arrest the judgment. But a new trial is also moved for on the law and evidence; and upon the evidence we should not, I think, be disinclined to grant a new trial upon any ground that would warrant it, especially if the award were for a large sum. When I say this I do not mean that I lay much stress on Mr. Booth's evidence, for I confess the manner in which he seemed disposed to nullify his own act in making what I should think he must at the time have intended to be an award, does not seem to me satisfactory. But, on the other hand, it has not a good appearance that the plaintiff appointed his own brother to be his arbitrator; and the manner in which his brother and the third arbitrator proceeded to come hastily to a conclusion before they had been sworn, and, for all that appears, without giving to the third arbitrator a due opportunity of being present, or hearing the parties, is altogether unsatisfactory. It has much the appearance as if Mr. Booth had on reflection become dissatisfied with his own proceedings, and desired to remedy it by cancelling what he and the plaintiff's brother had done, and beginning anew. But it is not clear that he and Mr. Spike could take up the matter after signing the paper of the 30th of June, which certainly has not the appearance of being intended to be a mere memorandum, but, on the contrary, has every appearance of having been signed with the intention of disposing thereby finally of the matter referred to them.

Nevertheless, there may have been abundant ground for moving the court to set aside that award under the statute; yet that was not done, and now we have to consider, whether, looking at the pleadings and the evidence, we should hold that the action was not sustained, and that the verdict was contrary to law.

The statute 16 Vic., ch. 181, is not by any means so full as the late municipal act, 22 Vic., ch. 99, upon this subject of compensation by arbitration for land taken for highways. The latter act is much more precise and complete in its provisions, but it has no application to this award, which was

made before that statute was passed. The action here is debt on the award. The defendants have not pleaded specially, setting up any facts as rendering the award void, nor have they by plea traversed the submission. Upon the plea of never indebted, admitting that it is a proper plea in debt upon award, and that it put the fact of submission in issue, I think the plaintiff was entitled to succeed, for it was admitted at the trial that the reeve appointed Mr. Spike as the arbitrator on the part of the corporation, and that is the mode of appointment directed by the statute. Besides, no objection that there was not a valid submission appears to have been taken at the trial. Then upon the plea of no award, the defendants could certainly not set up any misconduct of the arbitrators, such as not hearing witnesses, not giving notice of the meetings, &c., in order to shew the award void, and so to support their plea of no award. *Wills v. Maccarmick* (2 Wils. 148) is express on that point.—*Brazier v. Bryant*, 10 Moore 587.

If therefore the instrument of the 30th of June, 1858, was an award made by a majority of the arbitrators, as I think it was, it was within the submission; and being certain and final, and not revocable, I think the plaintiff could recover upon it at the trial, and that we should not set aside the verdict.

BURNS, J.—I think the rule obtained in this case should be discharged. The effect of the second provision in the 33rd section of the 16 Vic., ch. 181, is not to restrict the remedy upon an award to a summary application to the court, for in truth there can be no summary application to compel a corporation to pay an award. An application for an attachment cannot be made, and before any application for a *mandamus* to compel the corporation to pay the award can be maintained it must clearly appear there is no other legal remedy. The object of obtaining an award is, that it may be ascertained what amount of damages the corporation shall pay for taking the plaintiff's land for a road. As soon as that be ascertained, I can see no reason why an *assumpsit* should not lie for it as the price of the land taken, as an

action of trespass would have lain against them if they had forcibly taken the plaintiff's land without sanction of law. The plaintiff's proper remedy was by an action on the award. The power intended to be conferred by the proviso over this description of awards is that the court may entertain applications to set them aside as in ordinary cases. The appointment of a third arbitrator by the judge of the county court is expressly sanctioned by the same 33rd section, in case the two arbitrators failed within seven days after their appointment to choose a third person. In this instance the two could not agree, and therefore application was made to the judge of the county court. There is nothing in the objection that no by-law sanctioning the road was proved, in order to base the right to choose arbitrators and appoint a third. The plaintiff whose land was taken might object to the want of such proof, if necessary, but he assents that such a by-law was passed and acts upon it, as also did the defendants act upon it, and after that it cannot be in the mouths of the defendants to say the plaintiff shall not recover because he does not prove their own by-law.

As to the objection that the declaration shews that there were three persons named as arbitrators and only two made the award, I do not think there is anything in that. The statute says the award of two shall be binding, and it sufficiently appears upon the declaration that the award was made of and concerning a road taken off the plaintiff's land to make it come under the operation of the statute, that two might make an award. With regard to the objection, that the first paper signed by two of those named was not an award, or in fact the award in respect of the matters referred, I think the learned judge was right in his direction to the jury. If that paper was not for any reason properly an award, then application should have been made to the court to set it aside, and the value of the provision enabling the court to entertain the question in a summary manner would have been tested. We must, upon this action and these pleadings, treat the first paper as an award between these parties and hold that after that act the arbitrators were *functus officio*.

MCLEAN, J., concurred.

Rule discharged.

PRINCE V. MCLEAN

Difference of Name—Identity—Evidence of patent—Certified copy.

The patent for land issued to Michael *Corrigan*, and the name was so spelt in the deed from him under which the plaintiff claimed, but was signed Michael *Corgan*. *Held*, no variance.

A certified copy of a patent taken from the books in the provincial registrar's office, and signed by the deputy-registrar, is not sufficient as primary evidence instead of an exemplification.

EJECTMENT, for the east half of lot number eighteen in the eighth concession of Brock.

At the trial, at Whitby, before *McLean* J., it appeared that the plaintiff claimed through a patent from the Crown to one Michael *Corrigan*, but the evidence he gave of such a patent on the trial was not the patent itself, nor an exemplification of it under the great seal, but a certified copy, authenticated only by a certificate endorsed upon it that it was a true copy of the record of the original letters patent as entered upon the records of the provincial registrar's office in a book and folio named in the certificate, signed by the deputy-registrar.

It was objected that that was not legal evidence of the patent.

The plaintiff next proved a conveyance made by Michael *Corrigan*, as the name was spelt throughout in the deed, but signed *Michael Corgan*.

It was objected that there was a variance in the names, and no proof given of identity.

Leave was given to move for a nonsuit, on these grounds, and a verdict was rendered for the plaintiff.

M. C. Cameron obtained a rule *nisi* accordingly, to which *C. S. Patterson* shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We should be very cautious in giving effect to the objection that the grantee *Corrigan*, or *Corgan*, did not spell his name in the same way in the deed signed by him as it is spelt in the patent. Many uneducated people are not precise and uniform in spelling their names, and often add or leave out a letter from ignorance or want of care; and again, when there is no room for doubt as to the identity of the person

his name is otherwise spelt in the patent than he himself usually spells it, either because the more common and proper method of spelling the particular name has been adopted in the patent, without the knowledge that the person intended is in the habit of spelling it differently, or because some person who at his request has made the application for him on which the patent issued, has not been careful to spell his name as he spells it. We should hesitate here to say that Corrigan and Corgan are not *idem sonans*, pronounced as either name generally would be. The one at least might be easily mistaken for the other ; and at all events the jury, as we may suppose, were satisfied of the identity, and we have heard no reason suggested for doubting it.

As to the other objections. We always receive an exemplification of a patent as legal evidence of the grant upon its mere production, and without any evidence being given to account for the non-production of the letters patent which were issued to the grantee. But that is because the statutes 3 & 4 Ed. VI., ch. 4, and 13 Eliz., ch. 6, expressly make the exemplification under the great seal evidence of the same degree as the patent itself would be.

This is an attempt, the first that I know of, to rest upon evidence of an inferior degree—that is, a mere certified copy from the registrar's book, without its being exemplified under the great seal, and without any attempt being made to lay a foundation for the reception of parol evidence. This, we think, we cannot admit till legislative authority has been given for it, as it might perhaps be without danger to any interest, and the authorising it would save some trouble and expense.

It certainly is secondary evidence, and not admissible as a think, as the case now stands ; that is, not admissible as a matter of course, if at all. It is a mere copy taken from a book in the registrar's office in which copies of the patents are entered, and it is only certified under the hand of the officer to be a true copy. The book itself if produced would not be evidence on any principle of the common law without proof of some sufficient reason for not giving better evidence, and the 9th clause of our statute 16 Vic., ch. 19, does not

authorise the reception of this certified copy from the registrar's book, because the book itself if produced would not be evidence "on its mere production from the proper custody," and that is made a condition in all cases of receiving a certified official copy.

Instead of ordering a nonsuit, however, we will grant a new trial, the plaintiff paying the costs of the last trial within a month, otherwise judgment of nonsuit to be entered.

BICKLE V. BEATTY.

Lease—Construction of—Sale of part of the land—Abatement of rent—Right to distrain—Taxes.

Plaintiff leased to defendant certain land at a yearly rent of 15s., and the taxes, so that said taxes should not exceed £10 a year, any sum above that to be paid by the lessor, and it was provided that the lessor might sell any part of the farm, making a reasonable deduction from the rent therefore, to be determined by arbitration in case of dispute. The Grand Trunk R. W. Co. gave notice to defendant that they required a portion of the land, which he conveyed to them after an arbitration as to the price.

Held, 1st—That the land taken by the company was sold by the defendant within the meaning of the lease.

2nd—That the abatement from the rent should not be measured by the interest of the money paid by the railway company, but should be determined by the jury, upon a consideration of the comparative value to the tenant of the land sold, assuming 15s per acre as the average value of the whole.

3rd—That after the sale the lessor could not distrain without first arranging or offering to arbitrate as to the amount to be deducted.

4th—That there was no ground for claiming any abatement of the taxes from the £10 on account of the sale.

DECLARATION. First count, for money paid.

Second count, for interest.

Third count, trespass, *quare clausum fregit*, to part of lot 16, in broken front concession, township of Hamilton, lying north of the Victoria College grounds.

Fourth count, for making an excessive distress.

Fifth count, for distraining when no rent was due.

Sixth count, for distraining for more rent than was due.

Seventh count, for breach of covenant in a lease for quiet enjoyment of certain premises demised by defendant to plaintiff.

Eighth count, for breach of covenant in not paying taxes on the premises demised.

Ninth count, for breach of covenant in not making a fair and reasonable allowance from rent in consequence of the defendant having sold a portion of the demised premises, which by the lease he might do, and in refusing to leave the amount of such allowance to arbitration.

Pleas—1st, To the first and second counts, not indebted, and 2nd, To those counts payment in full.

To the third count—1st, Not guilty. 2nd, The close not the plaintiff's ; and 3rd, Leave and license.

To the fourth count—Not guilty, by statute.

To the fifth count—Not guilty, by statute.

To the sixth count—Not guilty, by statute.

To the seventh count—That by the indenture in that count mentioned, it was agreed between the plaintiff and defendant, that the defendant should at any and all times have the power to sell and dispose of any part of the demised premises, and in the exercise of that power defendant sold a portion to the Grand Trunk Railway Company, who thereupon entered, which is the breach complained of. 2nd, To that count, that as to the plaintiff's eviction from a portion of the premises, the Grand Trunk Railway Company entered and took the premises by virtue of their act of incorporation, and the powers given them by the Railway Clauses Consolidation Act; and 3rd, To that count, leave and license.

To the eighth count, That defendant paid and satisfied the taxes.

To the ninth count—1st, That defendant did make fair and reasonable deduction from the rent in consequence of the sale of the portion of the premises. 2nd, That no disagreement arose between them as to the sum to be deducted; and 3rd, That defendant did not refuse to leave to arbitration the amount of rent to be deducted

Issue was joined on all the pleas.

At the trial, at Cobourg, before *Draper*, C. J., the parties agreed as follows:—that the plaintiff should have a verdict for nominal damages upon the first count, subject to the opinion of the court, whether an allowance should be made from £10 to be paid by the plaintiff in proportion to the land sold. That a verdict should be entered for the plaintiff

with nominal damages on the fourth count ; and on the fifth count for £5 5s. 9d., if the court should be of opinion that the defendant's right to distrain had ceased under the lease ; and if such power had not ceased, then the verdict to be entered for defendant. That a verdict should be entered for the plaintiff on the ninth count with nominal damages, subject to the opinion of the court, whether the plaintiff should recover £21, the interest of the money paid by the Grand Trunk Company for the land taken by them, or £15, the value as stated by witnesses ; but if the court should determine that the deduction should be made per acre, and that the plaintiff had no other right to claim deduction, then a verdict should be entered for defendant ; and that a verdict should be entered for defendant upon the second, third, fourth, and eighth counts.

It was admitted that the defendant executed a deed of conveyance of the portion of the demised premises to the Grand Trunk Railway Company, after notice from the company to the defendant that the company intended to take the land under the compulsory powers of the act, and after an arbitration between the defendant and the company ascertaining the amount to be paid.

The litigation between these parties grew out of the terms of a lease executed by the defendant to the plaintiff for one hundred and nineteen acres of the lot specified in the third count, which lease was executed on the first of October, 1851, for the term of seven years from the first of April, 1852. The material parts of the lease to be considered were these : The habendum was, " to have and to hold the said farm, containing about one hundred and nineteen acres, more or less, hereby demised, together with all and singular the appurtenances thereto belonging, as hereinbefore set forth. unto the said Thomas Bickle, his executors, administrators, or assigns, for the term of seven years from the first of April, 1852, yielding and paying therefor yearly and every year the sum of fifteen shillings currency per acre for each and every acre as herein specified, for the said one hundred and nineteen acres, more or less, and the taxes upon the said farm and premises, so that the amount of taxes

does not exceed the sum of ten pounds currency per annum upon the lands hereby let, any sum exceeding the said sum of ten pounds levied or rated as taxes upon the said farm, to be paid by the said John Beatty, his administrators and assigns." A covenant followed by the plaintiff to pay the rent half yearly, and a covenant by the defendant for quiet enjoyment. This agreement then followed: "And it is further agreed that the said John Beatty shall at any and all times have the power to sell and dispose of any part or parts of the said farm, making a reasonable and fair deduction from the rent in consequence thereof, and if any disagreement should arise as to the sum to be deducted, then it may be left to arbitration."

In Easter Term last, *Weller* obtained a rule to shew cause why the verdict should not be entered for the plaintiff pursuant to the leave reserved at the trial.

In Trinity Term, *Cameron*, Q. C., shewed cause. He cited *Gilbert* on rent, 179, 180, 181; *Hyde v. Hill*, 3 T. R. 377; *Graham v. Wade*, 16 East 29; *Cumming v. Bedborough*, 15 M. & W. 438; *Croker v. Orphen*, 9 Ir. Equ. Rep. 563.

In this term *Galt*, Q.C., and *Weller*, supported the rule.

ROBINSON, C. J.—It does not seem that there is any room for doubt on either of the questions raised. The lease states very clearly what taxes the plaintiff was to pay as tenant, namely, £10 a year. He could not, under any circumstances, be required by his landlord to pay more, and there is no proviso in the lease under which he can claim an abatement of any part of that sum when the taxes amount to so much.

Then, as to the land taken by the railway company. It might be contended with some show of reason on the part of the defendant, that the land taken by the company was not voluntarily sold by him, and therefore that this was not a *diminution* of the quantity of land enjoyed by the plaintiff which, under the condition of the lease, could entitle him to an abatement of the rent; but I think, if that had been insisted upon by the defendant, we should have

been warranted in holding that the fair exposition of the instrument would entitle the plaintiff to an abatement of the rent. On the other hand, what the plaintiff contended for is altogether inadmissible, namely, that he should, as a matter of course, have an amount deducted from his annual rent equal to the annual interest of the money paid for the land taken by the railway company. According to that mode of estimating the abatement, if the company had required five acres instead of one, the plaintiff would have had a right to the remaining 114 acres of the defendant's land for nothing; and if ten acres had been parted with at the same rate the defendant would be bound to pay the plaintiff an annuity for living rent free upon 100 acres of the defendant's land.

The true principle of estimating the abatement is that by which the sum of £15 has been fixed upon by the jury as the value, namely, the comparative value to the plaintiff as tenant of the acre of land held by the company, taking the 15s. per acre as the average value of the tract.

The right to make a distress, I think, did not necessarily cease merely because the rent had become uncertain on account of the land conveyed to the company. It would have ceased if there had been a wrongful eviction of part of the land by the landlord, but that was not the case here. There is, however, this peculiarity in the present case, that the lease provides in fact that in case of any of the land being sold by the landlord, there "shall be a reasonable and fair deduction from the rent, *and if the parties cannot agree* as to the sum to be deducted, then it may be left to arbitration." This being the express agreement, the landlord had no right to apportion the rent for himself, and to distrain for such amount as he thought reasonable under the circumstances; but he was bound first to propose a deduction and see whether it would be assented to, and if not, then to go to arbitration, or at least to offer to do so. Instead of that he assumed the right to settle the deduction himself in the first instance, subject to the control of a jury, if he should afterwards appear to have distrained for too much. I think that, whatever he might have done if the lease had

been silent as to the method of apportionment, he could not so take the matter into his own hands in the face of this provision in the lease.

My opinion is, that on the first count a verdict should be entered for the defendant, and also on the fifth and sixth counts, and a verdict for the plaintiff for £15 on the 9th count.

BURNS, J.—The first question is, whether an allowance shall be made to the plaintiff from the £10 which he agreed to pay as taxes upon the farm. There does not appear any reason why such a deduction should be made because the defendant sold a part of the farm. It is expressly provided that he might at any time sell any part of it, and in such case a deduction was to be made from the rent, nothing being said about taxes. The plaintiff was to pay taxes not to exceed £10, but if the amount of taxes exceeded that sum, then it was agreed the defendant should pay the excess. What the whole amount of taxes was we are not informed, but whatever it might be, if £10 or under, the plaintiff was bound to pay it. It is quite impossible we can say there should be any thing allowed to the plaintiff in respect of any payment of taxes without knowing whether he paid any thing beyond £10. If he did pay beyond that amount, of course he would have a good claim against the defendant for it, but the probability is that the defendant paid, as he was bound to do, beyond that sum. If we suppose then that the taxes exceeded £10, the question would be, as we may suppose, was the point intended to be submitted to the court, whether the sale of a portion of the farm by the defendant would entitle the plaintiff to claim that he should not pay to the extent of £10, but should pay a proportionate sum less. The proviso giving the defendant permission to sell says nothing about a deduction of taxes, and the other provision is express enough, that the plaintiff shall pay the taxes up to that sum. We must suppose the terms of the lease were agreed upon between the parties before being reduced to writing, and then when reduced to writing the terms were that the defendant leased to the plaintiff the farm, the plaintiff to pay

taxes to the extent of £10, the plaintiff having the privilege of selling without any deduction of taxes, so far as would appear from the deed or lease, so long as the plaintiff was not called upon to pay more than £10. The verdict should therefore be entered for defendants upon the first count.

I think a verdict should be entered for the plaintiff upon the fifth count. It is very true the parties have stipulated that the defendant may at any time sell any part of the demised premises, but they have stipulated also, that if he does so a fair and reasonable deduction shall be made from the rent. Before the defendant sold the rent was fixed and ascertained by the lease, but when he exercised the privilege there was then no fixed or ascertained amount of rent.

The fixing the rent at so much per acre does not individualise the rent at 15s. per acre for any or every distinct acre. Each and every and all the number of acres were liable for the whole rent, and not each acre for its 15s. The landlord had no right himself to apportion the rent to be paid after he disposed of a part of the farm, and he could not say the amount of rent should be reduced by so much as the quantity sold would amount to at 15s. per acre. The agreement is, that a fair and reasonable deduction shall be made. What that deduction shall be has never been settled, and in fact this suit is brought to determine the point, as the parties did not agree, and the matter was not left to arbitration. The defendant in that state of matters was reduced to bring this action for use and occupation, and his right to distrain was gone until at least an attempt to arbitrate had been made. The amount of rent to be paid had become uncertain.

As to the ninth count, it seems the dispute between the parties is this; the plaintiff claims a declaration of £21 upon the rent, that sum being the simple interest of the sum of money the defendant received as the price of that portion of the farm he sold, and the defendant contends that the deduction which should be made should be after the rate of 15s. per acre according to the quantity sold, as that sum is fixed by the lease as the amount of rent.

Both of the parties are wrong. It cannot be of any consequence to the plaintiff at what price the defendant sold the land, whether he made a good or bad bargain by the sale. If the defendant had received a sum, which he might have done if he desired to sell cheap or make a present of it, which would have produced a very trifling sum as interest, in that case the plaintiff would scarcely have been willing to be content with such a deduction. On the other hand, the defendant has no right to say the deduction shall be at any particular sum per acre for the land sold. He may have sold the portion which enabled the plaintiff to make the greatest part of the whole rent from, though he did stipulate to pay at the rate of so much per acre for the whole. In the agreement the parties have agreed that the deduction shall be a fair and reasonable one. The only way to arrive at that is to know what the land sold was worth in comparison with what remained, and what advantages it had afforded the plaintiff, and what disadvantages he would sustain by being deprived of it. The sum fixed by witnesses, as stated, in consequence of not having it is £15. For what period of time that is does not appear, nor is it of any consequence; it would be for the period he was deprived of the land to such time as agreed upon between themselves.

I think the verdict should be entered upon this count for £15 for the plaintiff.

MCLEAN, J., concurred.

Rule accordingly.

HANKEY V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Certiorari—Practice—Appearance—Waiver.

Where a cause is removed from the County Court by *certiorari* after issue joined, *semble*, that the plaintiff should declare *de novo* in the court above.

In this case the plaintiff did so declare, and signed the judgment in this court, though the defendants had not appeared. Defendant moved in Chambers to set aside the judgment on other grounds, but made no objection for the want of appearance. *Held*, that he was precluded from afterwards objecting on that point.

J. Bell (of Belleville) obtained a rule *nisi* on the plaintiff to shew cause why the declaration and subsequent

proceedings should not be set aside for irregularity, because no appearance was filed for defendants, and the defendants did not appear ; or why the order made by the Chief Justice of the Common Pleas should not be rescinded, and the declaration and subsequent proceeding set aside for irregularity, on the grounds that the County Court of the County of Oxford being a court of record, and the cause being at issue in that court, the trial should be of the issue that had been so joined in the court below ; that the venue in the cause brought up was in the County of Oxford, and could not be changed without an order, wherefore the venue in the cause in this court should also have been in the County of Oxford ; that the declaration served was not founded on any writ, and that for the same cause of action another cause was at issue.

On the 8th of September, 1858, the cause was at issue in the County Court of Oxford. On the 11th of September the *certiorari* issued. Afterwards the plaintiff's attorney sent to the defendants' attorney a declaration in the cause in this court, who returned it with the remark that issue had been already joined in the cause in the court below, and that if compelled to plead *de novo* he should plead that another action was pending. The defendants' attorney made oath that he was afterwards served with an issue book made up on a declaration in the Queens's Bench, laying the venue in the County of Middlesex, and stating the same cause of action as had been set forth in the declaration in the County Court. Judgment by default was signed upon that declaration, and notice of assessment given on the 23rd of October.

It was sworn further that no appearance had ever been entered for the defendants, except in the court below ; that the cause of action arose in the County of Perth ; that the attorney was informed the defendants had a good defence to the action ; and that no process had issued in this case from the Queen's Bench, but only the summons on which the plaintiff had declared in the County Court.

On the 29th of October the defendants moved in Chambers to set aside the interlocutory judgment on the same grounds

that were stated in the application to this court, which summons was discharged.

The plaintiff's attorney filed an affidavit to the effect that the declaration in the County Court was for the same cause of action as that declared upon in the cause in this court; that the *certiorari* issued at the instance of the defendants; that the defendants' attorney did not give any notice, or take any exception until during this term (Michaelmas) on account of the want of appearance by defendants; and that in the application made at Chambers to set aside the interlocutory judgment no objection was taken on the ground of want of appearance, nor was any intimation given of such an objection, or that any attempt would be made to set aside the proceedings subsequent to the summons if the plaintiff should proceed to assess damages.

D. G. Miller shewed cause, citing *Turner v. Bean*, Barnes 345; Ch. Arch. Prac. 1268.

Read, contra, cited *Clack v. Dixon*, 3 M. & S. 93; *Clark v. The Mayor, &c., of Berwick*, 4 B. & C. 649; *Landens v. Sheil*, 3 Dowl. 90.

ROBINSON, C. J., delivered the judgment of the court.

We are not aware of any legislative provision in this province respecting removal of cases from county courts by *certiorari*. They have been granted, we assume, upon the principles of the common law; and we have nothing to govern us in regard to the subsequent proceedings upon the return of the writ but the practice pursued in England in like cases. In *Fazacharly v. Baldo* (1 Salk. 352) a distinction appears to be drawn between cases removed by a *habeas corpus cum causa* and those returned upon a *certiorari*; the former does not remove the record, but that remains below, and the return is only an account or history of the proceedings; and for this reason, it is said in that case, if a cause be removed by *habeas corpus* the plaintiff in the superior court must begin *de novo*. This we take to be equivalent to saying, that when the record is removed by *certiorari* the plaintiff need not begin *de novo*, otherwise there would be no such difference. In *Woodcraft v. Kinaston*

(2 Atk. 317), the same doctrine has the high authority of Lord Hardwicke, who says, "There is a difference between a *habeas corpus* and a *certiorari*. That removes the body *cum causa*, and then you must begin in the superior court and declare *de novo*; but on a *certiorari* you must proceed on the record as it stands when removed."

This is very distinct, and the law as thus laid down seems reasonable and convenient, for when the parties have been content to rest the matter in controversy between them upon a certain issue, it seems needless to incur the delay and expense of going over the same ground again after the removal of the cause; yet the practice in England after all seems not to be in accordance with the doctrine of Lord Hardwicke, for in the case cited of *Turner v. Bean* (Barnes 345), about the same time that the case of *Woodcraft v. Kinaston* was before Lord Hardwicke, the Common Pleas held that when proceeding from an inferior court of record were returned upon a *certiorari* into their court, and it appeared that the parties were at issue in the court below, the plaintiff must nevertheless declare *de novo*.

In Chitty's Archbold, 1247, this is recognized as the practice; and in Tidd's Practice, 5th ed., vol. I., p. 470, the same thing is stated more at length, and the reasons given for it from Lord Chief Baron Gilbert's Treatise on Executions, 144, 200.

We cannot hold that the plaintiff was wrong in declaring *de novo* when there is so much to support his proceeding, though we cannot but say that, considering the respectable footing on which our county courts are, we think it would be well if we were allowed to take up their proceedings in the stage at which they had arrived before the removal, for the reason given by Chief Baron Gilbert for the contrary practice no longer applies.

When the pleadings were *ore tenus* and *certiorari* could remove nothing but the writ, and the parties had of necessity to make their statements anew, since there existed no written pleadings to be removed with the writ. It does appear, however, that the current of authority sustains the plaintiff in having declared *de novo* in this court after the

removal of the cause, although the parties had pleaded to issue in the court below. It is said that the plaintiff in such a case cannot claim more damages than he had claimed in the other court, but there is no complaint of that having been done here.

We do not think that the defendants can be allowed, at this late stage of the proceedings in this court, to object that the plaintiff could not declare after the removal until he, the defendant, had appeared in this court, for he has acted in the cause in this court by the application he has made, and when he moved to set aside the interlocutory judgment he made no objection on the ground of defendants not having entered an appearance, but relied only on other irregularities.

If the defendants did not enter an appearance in this court after the removal of the cause, the plaintiff should have served him with a rule for a *procedendo* to issue unless he appeared within four days, because the plaintiff could not regularly declare against him till he had appeared. If within the time he had entered an appearance, then the plaintiff could properly declare. If the defendant failed to appear, then the *procedendo* would have gone, and the cause being sent back to the court below could never afterwards be removed. This would have been the regular mode of proceeding.

But we think the defendants, by their delay, and by the course they took in complaining of other irregularities, and omitting to object to want of appearance when they moved on other grounds, have precluded themselves from objecting on that ground now.

Rule discharged.

THE GREAT WESTERN RAILWAY COMPANY V. THE PRESTON AND BERLIN RAILWAY COMPANY.

Great Western R. W. Co.—Work performed beyond their charter—Right to recover—Agreement with Preston and Berlin R. W. Co.—Want of corporate seal—Partnership.

The defendants being unable to finish their railway, and the plaintiffs desiring to have it in operation as a feeder to their line, a correspondence was had between the two companies, and resolutions passed by the plaintiffs, and communicated to defendants, authorizing an arrangement by which the plaintiffs should work the road for a certain period and share the profits with defendants. No formal agreement was made, and the terms were not definitely settled, but the plaintiffs went on and completed defendants' line, and ran it for some time at a loss. They then sued defendants for the work done, and for the money expended above the receipts.

Held, that they could not recover, for as to the first demand, the constructing defendants' road was a matter without the scope of their charter; and as to the second, the agreement relied upon, being special in its terms, was invalid for want of the corporate seal.

Seem, that defendants under the circumstances should have been held to have accepted the work done, if there were not the other objection to the plaintiffs' recovery.

Seem, also, that a valid agreement in the terms of the resolution would not have created a partnership between the parties.

The plaintiffs sued upon common counts, for goods sold and delivered; for work done and materials found; money lent; money paid; money received; for hire of locomotives and cars by plaintiffs to the defendants from the 2nd of November, 1857, to the 31st of January, 1858; for fuel provided by plaintiffs at defendants' request for the locomotives during that period; for conveyance of goods and passengers by plaintiffs for the defendants; for wharfage and warehouse room of goods kept by the plaintiffs upon their wharves, and in their warehouses, for defendants; for tolls payable by defendants to plaintiffs for the passage of loaded waggons and goods of defendants over the plaintiffs' railway; for salaries and wages of station masters, clerks, porters, &c., employed and paid by plaintiffs for the defendants; and on account stated.

Plea—Never indebted.

The plaintiffs in the particulars claimed £365 2s. 5d., (including interest,) as being due to them for the expense they had been at in working the line between Preston and Berlin, after giving credit to defendants for all sums received for carrying passengers, mails and freight. And they

claimed £1996 15s. 11d., with interest, for work done by them on the defendants' line of railway, between the 19th of September, 1857, and 31st January, 1858.

At the trial, at Berlin, before *Robinson, C. J.*, the witnesses were George L. Read, the chief engineer of the plaintiffs, and William Powis, who was the secretary of the defendants. Both these witnesses gave a very clear account of the circumstances upon which the plaintiffs founded their claim, and it was agreed that it should be submitted to this court to determine upon the evidence whether the plaintiffs could legally claim upon either of their two alleged causes of action. There was no dispute as to the amount to which the plaintiffs would be entitled under either head of claim, if they could legally recover for either.

The plaintiffs advanced a claim against the defendants at the trial to the amount of \$1418 30 cts., for the expense the plaintiffs had incurred in working the defendants' line of railway, from the second of November, 1857, to the 31st of January, 1858, after allowing credit for what they had received for passengers and freight; and another claim for \$5364 45 cts., for work done by them upon the defendants' railway before they began to work it, and while they were using it.

The facts were these: The defendants were incorporated by statute 20 Vic., ch. 147, for making a railway from Preston to Berlin. On the 2nd of November, 1857, they had an estimate made by their engineer of the work then remaining to be done on their line, and it was certified that it would cost £6152 3s. 3d. to complete it.

The defendants probably not being in funds, some proposition was made verbally by Mr. Stephens, managing director of the Great Western Railway, to the president of the Preston and Berlin Railway Company, which being afterwards discussed at the board, the defendants' secretary, Powis, on the 3rd of September, 1857, wrote this letter to Mr. Stephens.

"I am instructed to notify you of the willingness of this board to make an arrangement on the basis suggested by you yesterday to our president, namely, that your company

should work the Preston and Berlin line for the first year, paying this company all earnings thereon, on the principle of a mileage appointment, less only the unavoidable expense of working the line. You will therefore much oblige the directors of the P. and B. Railway Company by bringing the subject before your board previously to your departure for Europe, as it is confidently expected that the road will be ready for traffic in October. Without wishing to give needless trouble, it would be very satisfactory if this company were furnished with some statement shewing the nature of those charges which will necessarily apply to the effective working of the line. The directors would also feel gratified in receiving any other information bearing on the subject with which you may be willing to favour them."

(Signed,) WILLIAM POWIS,

Secretary.

On the next day, 5th of September, 1857, the board of directors of the Great Western Railway Company (the plaintiffs) made this entry in their minutes.

"Read a letter from Mr. Powis, secretary of the Preston and Berlin Railway Company, of the 2nd inst., referring to the approaching completion of that line, and suggesting that arrangements be made for the working of that line by the Great Western Railway Company, and,

"*Resolved*—That in view of the increased traffic which the Preston and Berlin Railway will bring upon the Galt Branch and main line of this Railway, it is desirable to enter into an arrangement for the working of that line. That the necessary rolling stock be supplied for the working of that branch, and that an accurate account be kept of the cost of working the branch, the actual outlay for which will be charged to the Preston and Berlin Railway Company. That all appointments of clerks, servants, &c., be made to the Preston and Berlin Railway by this company, and all rates of fares, both for passengers and freight, to be fixed by this company, and to be divided according to a mileage proportion of the whole fare. That the arrangement be made to run from the opening of the line to the 31st of January, 1859."

On the 17th of September, 1857, Mr. Powis having learned that the directors of the Great Western Railway Company had come to certain resolutions upon the subject of his letter of the 3rd of September, applied for a copy of them, and received them from the secretary of the Great Western Railway Company, and on the 23rd of September,

1857, Mr. Powis, as secretary to the defendants, wrote as follows to the secretary of the Great Western Railway Company.

"Your letter of the 17th of September, together with a copy of resolution passed by your board on the 5th instant, was this day laid before the directors of this company, and I am instructed to express to you the satisfaction of our board with such resolution, and hope shortly to be able to notify the completion of the line."

(Signed,)

WILLIAM POWIS,

Secretary.

The Board of the P. & B. Railway Company on the same day, it appeared, had entered this minute in their proceedings:

"A letter was read from Mr. Stephens, Secretary to the Great Western Railway Company, enclosing an extract from the minutes of the board as to working the line. The board expressed their satisfaction with the arrangement proposed, and instructed the Secretary to notify the Great Western Railway Company to that effect."

There was also put in evidence at the trial a letter from Mr. Powis, defendants' Secretary, to the Managing Directors of the Great Western Railway Company, dated the 16th of January, 1858, as follows:

"I beg to acknowledge the receipt of your favour of yesterday, enclosing account against this company for £536 12s., and embracing various matters of importance in reference to this line. This letter will be laid before the Directors at a special meeting of the board, which will be convened early in the ensuing week, when I shall be probably instructed to address you fully on all the points set forth in your communication."

On the 13th of October, 1858, the following resolution was passed by the Directors of the Preston & Berlin Railway Company:

"*Resolved*—That the debentures of the Municipality of Berlin to the extent of £5,000 be paid to the contractors on account of the amount of the amended or supplemental contract of £10,200, upon the understanding assented to by the contractors, that on the company receiving the additional £5,000, they will indemnify this company against any claims for compensation preferred by the Great Western Railway Company, and carry out to completion their said contract of

£10,200, receiving payment in such debentures in the terms of the contract."

Mr. Read, the chief engineer of the Great Western Railway Company, who was called in support of this action at the trial, had, as partner with one Riley, taken the contract from the defendants for constructing their railway, but before he became the Great Western Railway Company's civil engineer he retired from the contract by an arrangement made with Riley. On the 2nd of November, 1857, it was estimated by the defendants' engineer, Mr. Booth, that it would take £6152 to complete the road according to the contract.

But the plaintiffs, in consequence of the understanding last come to in September between them and the defendants, had gone at once to work, and put the road in that state that it was capable of being used, though much yet remained to be done in order to complete it. They had advertised that it would be opened on the 2nd of November, 1857, and it was in fact opened a few days before that, and trains for the conveyance of passengers and goods commenced to run upon it under the management of the plaintiffs until about the 20th of January following, when the bridge over the Grand River at Doon was carried away, or so much injured that it could not be passed by the railway trains, and from that time the railway had ceased to be used. The traffic upon it while it was open had been unremunerative, and had come short of the working expenses by upwards of \$1,400.

The Secretary of the defendants swore that there had never been any agreement under the seal of either company in respect to the working of the road—nothing but the resolutions passed by the plaintiffs, and communicated to and concurred in by resolution passed by the defendants; and that while the railway was in use it was worked by the plaintiffs upon the principles then agreed upon. There had been no settlement of accounts of the earnings and expenses of the railway. The defendants had never in any manner bound themselves to pay the plaintiffs for the work done by them upon the railway, and nothing had passed in any shape authorising them to do the work preparatory to

the opening of the railway for which they were claiming \$5364 45 from the defendants.

Mr. Powis, the defendants' Secretary, whom the plaintiffs called as their witness swore further that the first he had heard particularly of any charge being intended to be made by the plaintiffs for constructing the work was in August, 1858, not long before the trial, but he added that it was well known the departments had no funds, and that on that account probably no demand had been made before.

Mr. Read, the plaintiffs' engineer, who was also called as their witness, stated that in October, 1857, the work on the Preston and Berlin line was stopped, and on the 27th of that month the line was inspected by the government inspector, and was reported to be incomplete, as the defendants well knew it to be. The track had been all laid, but had not yet been ballasted. There was fencing to be done, station houses to be completed, and other work to be finished about the stations, which was all work that was necessary to be done in the common course before the line could be opened. Mr. Read stated that he reported verbally to the Directors of the Preston and Berlin Railway Company at their meetings at Hamilton from time to time that this work was done, or being done, and that he made such reports as the engineer of the plaintiffs, and that the work charged for was chiefly done before the line was opened, such as ballasting, making water tanks, &c. He produced accounts and vouchers for the work done between the 19th of September and the end of December, 1857, the amount of which the defendants did not at all question either in term or at the trial and he stated that they made no objection when he exhibited the statements of work done, but expressed no opinion, and said nothing about paying for the work.

The witness said that he had nothing to do in regard to obtaining payment, but only to report what was done. The work, he stated, was done under the orders and at the expense of the plaintiffs, and all he did was to report verbally to the defendants at their board that such works were done, or being done; and he added that this was not done by him officially as any act of duty, or with any reference to payment and that all he could say was that

the work was done on the defendants' railway, and that all was still there as it was placed by the plaintiffs.

The difference between the plaintiffs' charge for the work done, \$5364, and the £6152, which was estimated by Mr. Booth as being necessary for finishing the contract, arose from the fact that there was a great deal of work not yet completed.

When the government inspector surveyed the line in October, 1857, he exacted many things to be done before the line should be opened, such as fencing, ditching, ballasting dressing off the sleepers, cuttings, &c. This was done by the plaintiffs, and was part of the work for which they charged.

All the rolling stock used in working the line belonged to the plaintiffs. They were to find that and employ the necessary clerks and servants, &c., the defendants providing only the road. They all expected there would be a profit from working the line, and had no idea of its resulting, as it did, in a loss.

The plaintiffs received all the earnings and kept all the accounts.

Mr. Read disclaimed having any particular knowledge of the agreement between the parties, having nothing to do with it, as he said.

A verdict was taken for the plaintiffs for \$6782 75 cts., the aggregate of the two sums claimed, with leave to the defendants to move to enter a nonsuit, or to confine the verdict to one or the other of the two heads of claim; and defendants were to be at liberty to raise all legal objections to the plaintiffs' recovery upon the evidence given.

Irving obtained a rule to shew cause why a nonsuit should not be entered, on the ground that there was no proof of a binding contract between the parties, nor any evidence of an acceptance or use of the road by the defendants, and because the plaintiffs and defendants were either partners in the transactions in question, or the plaintiffs were in the position of trustees or agents for the defendants, and no account had ever been stated or settled between them: or why the ver-

dict should not be reduced to the amount of the claim for working the road, on the ground that if there was any contract for the construction of defendants' road, it was a contract for a matter out of the scope of the plaintiffs' business as an incorporated company, and so not binding.

Burton shewed. The following cases were cited—*Henderson v. Australian Steam Nav. Co.*, 5 E. & B, 409; *Diggle v. London and Blackwall R. W. Co.*, 5 Ex. 442; *Homersham v. Wolverhampton Waterworks Co.*, 6 Ex. 137; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Bartlett v. Dimond*, 14 M. & W. 49; *Pardoe v. Price*, 16 M. & W. 451; *Cope v. Thames Haven R. W. Co.*, 3 Ex. 841; *Finlay v. Bristol &c., R. W. Co.*, 7 Ex. 409; *Edwards v. Lowndes*, 16 Eng. Rep. 204; *Williams v. Chester, &c., R. W. Co.*, 15 Jur. 828; *East Anglian R. W. Co. v. Eastern Counties R. W. Co.*, 21 L. J. (C. P.) 23; *Murnt v. Shrewsbury, &c., R. W. Co.*, 3 Eng. Rep. 144; *McGregor v. Dover, &c., R. W. Co.*, 17 Jur. 21.

The statutes cited are referred to in the judgments.

ROBINSON, C. J., delivered the judgment of the court.

The plaintiffs were evidently desirous, on their own account, of having the defendants' line of railway brought as speedily as possible into use, as it might prove a valuable feeder to their own railway; and the defendants having no present means of their own, and hoping that their line would be worked by the plaintiffs at profit, of which they would partake, and so perhaps be enabled to carry their work through to its completion, willingly availed themselves of the plaintiffs' proposition. But unfortunately nothing was done in that manner which the law contemplates as necessary for making a corporation liable, and in regard to the footing on which the plaintiffs were to do the work necessary for bringing the railway into use there seems to have been nothing settled.

First, as to the principle cause of action, the charge for work done on the defendants' railway. It is not disputed by the defendants that the work charged for has been done upon their railway by the plaintiffs, and they do not resist the plaintiffs' claim upon any objection either as to the amount charged or as to the quality of the work.

If therefore the work were done at the request of the defendants, and they had accepted and availed themselves of it, there would be no difficulty in the way of the plaintiffs' recovery on the mere ground that there was no contract under the corporate seal of the defendants, whereby they bound themselves to pay for it as much as in the opinion of a jury it might be work, because it was clearly within the scope of their charter to procure the work to be done, and not foreign to the purpose for which they were incorporated. The case of *Diggle v. London and Blackwall Railway Company* (5 Ex. 442), and of *Lamprell v. The Billericay Railway Company* (3 Ex. 283), and a few modern decisions in accordance with them, would indeed have seemed to create a difficulty in the way of the plaintiffs' recovery for the value of their labour and materials, even under such circumstances as we have stated. But those cases always seemed to us to be an unwise and unwarranted departure from the current of previous authorities, which from a very early time had admitted of a distinction in regard to liability in such cases between executed and executory contracts, and we have therefore never conformed to them. And it is satisfactory to find from the case of *Henderson v. The Australian Steam Navigation Company* (5 E. & B. 409), and of the same company *v. Marzetti et al.* (11 Ex. 228), and *Lowe v. London and North Western Railway Company* (18 Q. B. 632), and other late cases, that the courts in England have returned to the just and reasonable doctrine from which they had departed, and have sustained the principles laid down in *Beverley v. The Lincoln Gas Light Company* (6 A. & E. 829), which recognised an established distinction between executed and executory contracts that can be traced back to the year books.

There seems now indeed to be some appearance of a disposition in the courts in England to depart from the old current of authority in the very opposite direction, and to hold that a corporation, as long as they keep themselves within the proper sphere of their business, may without any express legislative provision make themselves liable as upon special executory contracts, and that without regard to

importance or amount, in the same manner as individuals may : that is, by correspondence conducted by their officers, or by resolutions entered on their minutes, and without binding themselves under their corporate seal. Upon that point the language of several late judgments in England shews a tendency to relax from the well settled principles of former times, though the opinion of the judges upon it seems unsettled and inconsistent, so that there is some reason to fear the same inconvenience from fluctuating decisions on that branch of the question that has been felt for some years past from the conflict of authorities upon the other point.

We may, however, take it to be clear that in case the work for which the plaintiffs are seeking to recover was done upon the defendants' railway at their request, and had been accepted and used by them, they would be bound to pay for it according to its value, notwithstanding the want of any undertaking by them under their corporate seal to pay for it. But there are other grounds besides the mere want of a sealed contract upon which the defendants' liability is disputed.

They object that to construct a railway between Preston and Berlin was foreign to the purpose for which the plaintiffs were incorporated ; that they could not legally engage in a work out of the scope of their charter, and cannot therefore claim compensation for their labour and materials so applied.

That objection appears to be well founded in fact, for the statute 18 Vic., ch. 70, sec. 5, though it did give power to the Great Western Railway Company to build and finish the road and works of the Galt and Guelph Railway, expressly confined their permission to that work, and in terms withheld it from the extension of the railway from Preston to Berlin. And the statute 20 Vic., ch. 147, secs. 7, 8, though it does make it lawful for the Great Western Railway Company to contract with the defendants for working or using their railway, or to lease it from them, does not give them authority to construct the defendants' railway either wholly or in part.

The principles of the common law which prevent a corporation constituted for a particular purpose from conducting business foreign to that purpose, are strengthened in their application to this case by the provision in the 5th section of 18 Vic., ch. 70, which expressly withholds any legislative sanction for the plaintiffs doing the work which they are now charging for.

In the absence of any power given to the plaintiffs to construct a railway between Preston and Berlin, they could not legally employ the funds of the shareholders in applying labour and materials to that line of railway any more than they could to making a railway, or a canal, or turnpike road in any other part of the country. And this being so, the plaintiffs cannot, in our opinion, enforce payment by the defendants for the work so done, first, because it is contrary to the general policy of the law, and inconsistent with the protection due to the shareholders in the Great Western Railway, that the Directors should apply the powers of their charters to, and expend the funds of the Company on an object not within the scope of their charter; and, secondly, because the plaintiffs have not the privilege of suing in a corporate capacity except for causes of action arising out of their legitimate business. It may seem in such cases hard that the party which has received the advantages of the labour or materials of the Company should be allowed to avoid paying for them by setting up such a defence; but the argument has received this obvious answer, that it is not for the sake of the defendant in such cases that the defence is allowed, but from necessity, in order to confine corporations to the legitimate use of their powers, for if they could enforce their demand in such cases there would be no value or force in the legal principle which declares that they shall have no power to act out of the proper scope of their charter.

We think, therefore, that for this reason the plaintiffs cannot recover for the work done, and it is of no moment to consider what has been further objected by the defendants, that they have never accepted and used the work.

That would be rather a nice question to pronounce upon.

The defendants, it is true, have never used the work for which the plaintiffs are charging, neither did they request it to be done, but so far they have accepted the work, and in one sense used it, that they made an arrangement by which they were to have received a certain share of the profits made by the use of the road, the road itself being all that they contributed ; and they were also using the road in the same sense as a man is held to be in possession of land which he is occupying by his tenants.

We think the defendants should be held to have accepted the work and materials of the plaintiffs, when they saw and approved of the work going on, and expected to derive a profit from the use of it ; and besides, it is permanently upon their land. But this is all of no consequence in the view which we have taken of the first objection.

Then as to the other head of claim, namely, for the plaintiffs' expenditure in working the road, or rather for the amount which they laid out in wages and other working expenses beyond the freight and passage money which they received. The statute 20 Vic., ch. 147, sec. 7, allowed the two companies to enter into such arrangements as they might think fit for the working by the Great Western Railway Company of the defendants' line of railway, but the first objection is, that the agreement under which the plaintiffs are seeking to recover is special in its nature or terms, not one of a kind which the law could imply from any facts proved, and that no such agreement has been entered into by these two corporate bodies under their corporate seals, and there is therefore no such proof as we can by law receive of the alleged special contract.

We are asked to act upon a resolution of the plaintiffs, coupled with a correspondence, and with verbal evidence of the acquiescence of the defendants in the terms proposed in that resolution.

There is nothing to bind either party* to an agreement of that special nature. If we could act upon what is before us as forming a contract binding upon the parties, we think* at present that the terms of the plaintiffs' resolution of the 5th of September, 1857, would make the working expenses of the

Preston and Berlin line a charge in the first instance against the Company, from which must have been deducted their share, according to mileage, of the fares paid for passengers and freight carried over their road, and that the defendants would be liable for any excess of working expenses above their proportion of the receipts.

The plaintiffs were to find the rolling stock and the defendants gave the use of their road, this, as we suppose, being accepted as an equivalent for the other ; and as they were to receive all the moneys paid in the first instance to the plaintiffs for passengers and freight, it is reasonable to suppose that before any money could be received by them the cost of receiving that money must first be deducted. And this is what the resolution imports, and what the letter of the defendants' secretary of the 3rd Sep., 1857, also imports.

We do not think that a partnership would have been constituted between the parties by a valid agreement in the terms of that resolution, for they were not upon any terms of sharing profit and loss, but defendants were to have all that was earned upon their road, and were to pay all the expense of working it.

Whether an action would have lain upon a sealed contract in those terms, before any balance had been struck of the working expenses above the earnings, and an account settled by both parties, may be more doubtful, but my opinion at present is, that taking the 7th section of 20 Vic., ch. 149, and a contract in those terms together, the plaintiffs could have sued at law for the expenses, giving credit for the receipts.

But, as we have already stated, the plaintiffs' action in our opinion fails as to the claim for work done on the line, because it was out of the scope of the plaintiffs' charter to construct a railway between Preston and Berlin, or to assist in it, and therefore they cannot in their corporate capacity sue for payment for such work. And we think the action fails under the other head of claim, because they are suing upon an agreement special in its terms, and such as cannot be implied, and they produce no such contract as we can hold binding upon the defendants.

We think therefore that a nonsuit must be entered.

GREENWOOD V. FARRELL.

Insolvent debtor—Promissory note—Effect of discharge.

The plaintiff having made advances for defendant, took his note for the amount, £366, on the 18th of March, payable in three months. On the 19th defendant obtained his final order for discharge under the 8 Vic., ch. 48, the plaintiff being mentioned in his schedule as a creditor for £150.

Held, that the order was no bar to recovery on the note, even as to the £150, if included in it.

The plaintiff declared on a promissory note made by the defendant on the 18th of March, 1857, payable to the plaintiff in three months, for £366 4s. 6d. The defendant pleaded—1. Payment. 2. Set off. 3. That he made the note for the plaintiff's accommodation. 4. A special plea, amounting to an allegation that the plaintiff received the note for a special purpose, and held it without consideration,

5. That the defendant being indebted to the plaintiff in £150, and to others, applied by petition to be discharged under the insolvent act of 19 & 20 Vic., ch. 93, and inserted his debt to the plaintiff in the schedule annexed to his petition: that the plaintiff threatened to oppose his discharge, and that it was therefore agreed between them that the plaintiff should forbear to do so in consideration that the defendant would make the promissory note sued on; that the plaintiff did not oppose, &c.; and that after this note was made and delivered upon such agreement, namely, on the 16th of March, 1857, an order for the defendant's discharge was made by the judge of the County Court of Frontenac, Lennox, and Addington, whereby the defendant was duly discharged according to the said statute from the said debt, and in respect wherof the defendant had made and delivered the said promissory note, and the said discharge still remains in full force and effect.

6. That under the statute 8 Vic., ch. 48, the defendant, on the 16th of January, 1857, petitioned for relief as an insolvent debtor, and on the 19th of March, 1857, after all necessary proceedings, a final order was granted for protection and distribution, &c., "and that the debt for which the note in the declaration mentioned was given, was a debt contracted before the filing of the defendant's petition, and

was mentioned in the schedule attached to his petition, and the plaintiff had due notice thereof."

The plaintiff took issue on all the pleas.

At the trial, at Kingston, before *Draper*, C. J., it appeared by the evidence that the plaintiff having made advances for the defendant to different persons, took the note now sued on for the amount of those advances. He had paid on the defendant's account all the sums included in the note, except one for which he had given his note to a third party, which was due, and judgment had been obtained upon it. The note was made on the 18th of March, 1857, the day before the defendant obtained his final order as an insolvent debtor. The plaintiff's name as a creditor for £150 was inserted in the schedule annexed to the defendant's petition applying for the benefit of the insolvent act. Whether that debt of £150 formed any part of the larger amount for which the note sued on was taken did not appear clearly on the evidence. The defendant was examined as a witness upon the trial, and swore that he knew nothing of his name being upon the schedule, though he did know when he took the note that the defendant had petitioned and was applying for his certificate. He denied that the note was given to plaintiff upon any agreement that he should not oppose the defendant's discharge, but admitted that he had spoken to a person about opposing the defendant's discharge.

A verdict was given for the plaintiff for £386 9s. 6d. damages.

Draper obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, on the ground that the debt for which this note was given was contracted before the granting to the defendant of the final order under the 8th Vic., ch. 48, that was set up as a defence under the sixth plea. He cited *Davis v. Holding*, 1 M & W. 159; *Cockshott v. Bennett*, 2 T. R. 763; *Parslow v. Dearlove*, 4 East 438; *Ashley v. Killick*, 5 M & W. 509.

Richards, Q. C., shewed cause, and cited *Evans v. Williams*, 1 Cr. & M. 30; *Sweenie v. Sharpe*, 4 Bing. 37; *Leonard v. Baker*, 15 M & W. 202; *Robins v. Viscount Maidstone*, 4 Q. B. 811; *Earle v. Oliver*, 2 Ex. 71; *Kirkpatrick v.*

Tattersall, 13 M. & W. 766; Fleming v. Hane, 1 Stark, 370; Chitty on Contracts, 180.

The statutes referred to are cited in the judgments.

ROBINSON, C. J.—It is quite clear to me that the evidence did not prove the fifth plea, on the contrary, that plea was disproved.

We are to determine the question that has been raised in this case on the sixth plea upon a state of the law respecting insolvent debtors such as existed in England when the cases of Sweeney v. Sharpe (4 Bing. 37), and Evans v. Williams (1 Cr. & M. 30), were decided. The statute of the 7th Geo. IV., ch. 57, sec. 61, had not then been passed, under which the subsequent cases of Ashley v. Killick (5 M. & W. 509), and Denne v. Knott (7 M. & W. 143), were disposed of. Our statute, 8 Vic., ch. 48, contains no provision similar to that which I have referred to in the British act, 7 Geo. IV., ch. 57, and therefore we must hold, as was held in Evans v. Williams, that the note now sued upon, whether made before or after the certificate, was a new promise upon good consideration, and would be binding upon the defendant notwithstanding anything in our statute 8 Vic., ch. 48, even in respect to such portion of the amount as constituted the old debt, and of course in respect to that larger portion of which was a new debt in fact, as well as the subject of a new contract. In my opinion the rule for nonsuit must be discharged.

BURNS, J.—The defendant made his application to the judge of the County Court for discharge as an insolvent under the statute 19 & 20 Vic., ch. 93. After he presented and filed his petition, in which the plaintiff is represented as a creditor of his, he gave the plaintiff a promissory note for a very much larger sum than stated in his schedule annexed to the petition for discharge, and after giving the note he obtained his final order, before the statute 20 Vic., ch. 1, was passed. The evidence does not establish that the giving of this note was for the purpose of buying the plaintiff off from opposing the final order being obtained by the defen-

dant, as he has set up in his defence. Possibly it may have been so, but the only evidence which the defendant seems to have of that being so was to examine the plaintiff himself, which right he exercised, and the plaintiff swears that it was not so.

The only remaining question then is, what is the effect of the final order obtained by the defendant, and will it bar the plaintiff from suing the defendant upon the note so given to the plaintiff. I do not think there can be any question upon the point. In bankruptcy the effect of the certificate is to bar not only debts due and owing at the time of the commission issuing, but also all debts proveable under the commission up to the time of the granting of the certificate. A new promise, however, to pay the debt before the certificate was granted, making the debt payable at a future time, might be enforced after the certificate was obtained—*Kirkpatrick v. Tattersall* (13 M. & W. 766), and *Earle v. Oliver* (2 Ex. 71). The 59th section of the Bankrupt Act in this province, 7 Vic., ch. 10, was in conformity with the Bankrupt Acts in England, 6 Geo. IV., ch. 16., section 12, and 5 & 6 Vic., ch. 122, section 37, and the 65th section of our act was in conformity with sections 131 and 43 respectively of the other acts. In fact the same question in this case cannot arise, for the legislature has specifically enacted to what time the final order shall have effect. The defendant claimed to be a trader within the meaning of the Bankrupt Act, but had become insolvent since the expiration of it, and claimed to have the benefit of the Insolvent Act, 8 Vic., ch. 48. The third clause of the 19 & 20 Vic., ch. 93, enacts that the final order to be obtained by this class of persons, in addition to the effect given by the fourth section of 8 Vic., ch. 43, shall operate as a discharge of all debts or liabilities due or contracted up to the time of the presentment of the petition, as fully and completely, and to the same extent, as if it had been a certificate obtained under the 39th section of the Bankrupt Act. Here the promissory note was given after the presentment of the petition, and the only argument which can at all avail the defendant is, that it was given for a pre-existing debt, and should be looked

at and considered in that light, and therefore the final order should be held to bar it. The answer to that is, if the defendant will give a promise to pay a pre-existing debt from which the law has freed him, he will again be liable on the new promise.

Judgment should be given for the plaintiff.

MCLEAN, J., concurred.

Rule discharged

ROLSTON v, LAWSON.

Replevin—Part of the goods not replevied—Right to damages.

In replevin for a cow and calf it appeared that the calf only had been replevied under the writ, as the cow could not be found, but the plaintiff proved his right to both.

Held, that he was entitled to recover the value of the cow.

REPLEVIN for a cow and calf.

The trial took place at Milton before *Draper*, C. J., and resulted in a verdict for the plaintiff for 20s., the usual expense of the replevin bond. It was proved that the calf only was replevied upon the writ; the cow could not be found to be delivered to the plaintiff by the bailiff who executed the writ. It was proved that the cow as well as the calf had been in the possession of the plaintiff and taken away by the defendant. The plaintiff claimed to have damages assessed for the value of the cow, and that it should be included with the expenses. The Chief Justice was inclined against the plaintiff being entitled to these damages, but directed the jury to assess the value of the cow, which they did at £10, and reserved leave to the plaintiff to move to increase the verdict by adding that sum.

Read, Q. C., obtained a rule *nisi* according to the leave reserved. *M. C. Cameron*, during last term, shewed cause, *Mayne* on damages, 228; *Ch. Arch.* 1030; *Gilbert* on Replevin 160; *Wilkinson* on Replevin 85, were cited.

ROBINSON, C. J.—The plaintiff's right to the cow seems to have been made out upon the evidence at the trial, and

we think it clear, both in reason and upon authority, that the cow not being forthcoming, so that she could be delivered to the plaintiff under the writ of replevin, he can recover in this form of action substantial damages for her value. This is so laid down in the most modern book of practice, Chitty's Archbold, 1031, and is supported by authority of Chief Baron Gilbert. We see nothing in our replevin act that should lead to a different practice.

BURNS, J.—It is stated by Mr. Wilkinson in his treatise upon replevin, that where the goods have not been delivered on the replevin, damages are recovered for the plaintiff as well for the value of the goods as for the detention; but where the goods are delivered, which is the case in general, then damages are only given for the detention.

The declaration in this case charges the defendant with taking the goods and unjustly detaining them

The rule should be absolute to add £10 to the verdict.

MCLEAN, J., concurred.

Rule absolute.

THOMPSON ET AL. V. MCLEAN ET AL.

*Sureties for sheriff of united counties—Dissolution of union, effect of—Duration of covenant—*3 W. IV. ch. 8, 4 & 5 Vic., ch. 91, 12 Vic., ch. 78.

Held, BURNS, J., *dissenting*, that the sureties for a sheriff as sheriff of the United Counties of Middlesex and Elgin, were not liable for him as sheriff of Middlesex only after the union had been dissolved.

Held, also, that under 3 W. IV., ch. 8. and 4 & 5 Vic., ch. 91, taken together, the covenants given by such sureties are not necessarily limited in duration to four years.

The plaintiff sued on a covenant dated 19th May, 1852, made under an act passed in the year 1833, 3 Wm. IV., ch. 8, to make certain regulations relating to the office of sheriff, and to require the several sheriffs to give security for the due fulfilment of the duties of their office. The declaration alleged that defendants covenanted, each in the sum of £250, that James Hamilton, since deceased, as sheriff of the United Counties of Middlesex and Elgin, should well and truly pay over to the persons entitled to the same all such moneys as he should receive by virtue of his office of sheriff from the

date of the said covenant, and that neither he nor his deputy should within that period wilfully misconduct themselves in the said office to the damages of any person being a party in any legal proceedings. The declaration then set out that after the making of the deed of covenant the Counties of Elgin and Middlesex continued united until the 30th day of September, 1853, when the union was dissolved by law, and the County of Elgin became from thenceforth a separate county; that the said James Hamilton was sheriff of the united counties up to the time of the dissolution of the union between them, and that from henceforth he continued to be sheriff of the County of Middlesex. That while the said James Hamilton continued to be sheriff of the County of Middlesex, the plaintiff, on the 21st day of December, 1857, sued out a writ of *capias* against one Charles W. Robertson, in respect of certain causes of action before then accrued to the said plaintiff against him, which writ was endorsed for bail for £500, and delivered to the said sheriff to be executed: that the said sheriff did within six months from the date thereof duly execute the said writ, and took and arrested the said Charles W. Robertson by his body, and detained him in his custody for the cause aforesaid; that the said James Hamilton not regarding the duties of his office, afterwards, to wit, on the 23rd day of December, 1857, without the leave or license, and against the will of the plaintiff, voluntarily and negligently suffered the said Charles W. Robertson to escape and go at large wheresoever he would out of the custody of him, the said sheriff, the said debt being wholly unpaid; that the said Charles W. Robertson did not put in special bail according to the exigency of the writ of *capias*, by reason whereof the plaintiffs had been delayed in the recovery of their said debt, and were likely to lose the same and their costs of suit against him; and so the plaintiffs said that the defendants had not kept the said covenant so by them made as aforesaid, that the said James Hamilton should not after the date of the said covenant, and while he remained as such sheriff as aforesaid, wilfully misconduct himself in the said office as sheriff, to the damage of any person being a party to any legal proceedings, but had broken the same; and the plaintiffs claimed £500.

The defendants demurred, on the grounds : 1. That the covenant declared on became inapplicable, and of no longer validity, when the sheriff ceased to be sheriff of the united counties.

2. That the covenant at most only extended over a period of four years, which had expired before the misconduct complained of.

Eccles, Q. C., for the demurrer. *M. C. Cameron*, contra, cited *Ross v. Farewell*, 5 C. P. 29.

The statutes bearing upon the case are noticed in the judgments.

ROBINSON, C. J.—The defendants have taken two objections to this declaration. The first is, that the covenant which the defendants entered into became inapplicable, and ceased to be binding, when the sheriff was no longer sheriff of the United Counties of Middlesex and Elgin.

The second objection is, that at any rate the covenant only covered a period of four years, which period had expired before the default or misconduct which is complained of as being a breach of the covenant.

As to the first objection, the law is strict in not holding securities to be liable for any thing not coming within the express terms of their undertaking, and there are many cases in which sureties have been held to be discharged by reason of some change having taken place which would vary, though in a slight degree, the nature of their responsibility. *Pitman on Principal and Surety*, 34 to 54.

The covenant set out in this case was made on the 19th of September 1852, and it is to the effect that J. H., *sheriff of the United Counties of Middlesex and Elgin*, should pay over to the persons entitled to the same all such moneys as he should receive *by virtue of his said office of sheriff*, and that neither he nor his deputy should misconduct themselves *in the said office* to the damage of any person being a party in any legal proceedings. And the plaintiff avers that after this covenant was entered into for such due performance of his office by J. H., *as sheriff of the United Counties of Middlesex and Elgin*, namely, on the

30th of September, 1853, the union between these counties was dissolved, the said J. H. having continued up to that time to be sheriff of the united counties; that when the union was dissolved he continued and was sheriff of the County of Middlesex, and that all acts in force relating to the office of sheriff of the united counties continued in full force in respect to the office of sheriff of the County of Middlesex; and that after the making of the covenant, and while the said J. H. continued to fill the office of sheriff of the County of Middlesex, the writ mentioned in the declaration came to him to be executed, &c.

Now, independently of any statutory provision, if the alteration made in the office held by the sheriff, J. H., had been one that increased his sphere of duty, and consequently his responsibility, I should have no doubt that the covenant given in such a case would not apply under the altered circumstances, and that the securities would be discharged. The alteration made here was of an opposite character; it diminished the sheriff's bailiwick, and consequently left him less duty to perform, and his securities less to be answerable for. Still it was not the same office; the emoluments would be diminished as well as the duty, and especially as regards the paying over of moneys there might be temptations from straitened circumstances in the one case which there would not be in the other; and at any rate, the offices were not identical, no one has a right to judge for the securities, and to determine that they ought to be content to be bound in the one case as in the other. If left to the principles of the common law, my opinion is that the securities would not continue bound after such a change in the office as was made in the present case.

That when statutory provision is there applicable to the case? If the effect of any such change would be to enlarge the sheriff's bailiwick, we would hardly expect to find that the legislature had by an act provided that the covenant of the securities should still remain in force. Where the change was to have an opposite effect, there would be less scruple in doing so, and in either case, if the statute containing any such provision for continuing the security in case of a change

of territory were in force when the covenant was entered into, there would be no reason to complain of the effect upon the securities, since they would know beforehand what might be the effect of their undertaking under any such change of circumstances ; and at any rate, whatever provision the legislature might have made upon the subject we should be bound to carry it into effect.

In the argument we were not referred to any express provision contained in any statute that meets this case ; but it was assumed that the Territorial Division Act, 12 Vic., ch. 78, has the effect of keeping the defendants' covenant in force, though J. H., for whom the defendants were bound, had ceased to be sheriff of the United Counties of Middlesex and Elgin.

If the covenant had been entered into while the division of the province was into districts, and J. H. had been sheriff *ex. gr.* of the district of London, that if he afterwards became sheriff of *the same territory* formed into a union of counties, or into one country, I think the 12th Vic., ch. 78, section 3 and 8, might have warranted our holding that the covenant continued to bind, for the change would not be one of substance, but only of name.

But this is not such a case. Then does the 37th clause of the 12 Vic., ch. 78, meet this difficulty ? I do not think it does, nor any other clause that I can see in that statute. I can find nothing in any other act affecting the question, and so I conclude that the defendants' undertaking for the due performance of the duties of the office of sheriff of the United Counties of Middlesex and Elgin does not extend to the performance of the duties of sheriff of the County of Middlesex after the dissolution of the union.

The sheriff of the united counties in all such cases, I believe, has been considered as continuing in office for the senior county without any new appointment, but I do not see that either section 18 or 37 of the 12 Vic., ch. 78, or any other statute, clearly makes a provision to that effect, though such may, I suppose, be taken to be the intention and effect of the 18th clause. Allowing however that the sheriff of Middlesex and Elgin continued to be sheriff of

Middlesex alone without any new commission after the separation, still the difficulty is, that the defendants did not become sureties for Mr. Hamilton as sheriff of Middlesex alone, but as holding the office of sheriff of Middlesex and Elgin. The legislature may have assumed that the covenant would continue binding notwithstanding this change in the office, for it seems they made no provision to that effect. But without such provision I think the common law compels us to say that the undertaking of the sureties being one *strictissimi juris*, and the defendants not having bound themselves to answer for the due performance of the duties of the office of sheriff of Middlesex, but of the office of sheriff of the two Counties of Middlesex and Elgin, they cannot be held liable for that which they did not undertake. The cases are very numerous upon this subject, and in many of them the change was less substantial than in the present case. I refer to *Stoughton v. Day*, *Alley* 10; *Bartlett v. The Attorney-General*, *Parker's Rep.* 277, 2 *Saunders* 411; *Dance v. Girdler*, 1 *New Rep.* 34; *Bacon v. Chesney*, 1 *Stark.* 192; *Wright v. Russell*, 3 *Wils.* 530; *Bellairs v. Ebsworth*, 3 *Camp.* 53; *Stratton v. Rastall*, 2 *T. R.* 370; *Barker v. Parker*, 1 *T. R.* 287; *Myers v. Edge*, 7 *T. R.* 254; *The Wardens of St. Saviour's v. Bostock*, 2 *New Rep.* 175; *Simpson v. Cooke*, 1 *Bing.* 452; *Phillips v. Astling*, 2 *Taunt.* 206; *Weston v. Barton*, 4 *Taunt* 673; *Glyn v. Hertel*, 8 *Taunt* 225; *Evans v. Whyle*, 5 *Bing.* 485; *Strange v. Lee*, 3 *East* 484; *Metcalf v. Bruin*, 12 *East* 400; *Pemberton v. Oakes*, 4 *Russell* 154; *Bamford v. Iles*, 3 *Ex.* 380; *Whitcher v. Hall*, 5 *B. & C.* 269; *Leigh v. Taylor*, 7 *B. & C.* 491; *Barclay v. Lucas*, 3 *Doug.* 321; *Chapman v. Beckinton*, 3 *Q. B.* 703, 722; *London Assurance Co. v. Bold*, 6 *Q. B.* 514; *Mayor of Berwick, &c. v. Oswald*, 3 *Ell. & Bl.* 653; *Kitson v. Julian*, 4 *Ell. & Bl.* 854.

As to the other objection taken, if necessary to determine it, that seems to turn upon the two statutes 3 Wm. IV., ch. 8, and 4 & 5 Vic., ch. 91, section 12. We have not been referred to any other enactment. These leave it on no clear footing.

I suppose the repeal of the 6th and 19th clauses of

the 3 Wm. IV., ch. 8, was intended to put an end to the limitation of four years in the covenant, and yet the schedule B. and the section 2 are left unchanged, which only authorise a covenant for four years. If that limitation is yet in force, the defendants could not sue on a covenant not made to themselves, unless it be such a covenant as the statute has enabled them to sue upon.

The 9th section, perhaps taken in conjunction with the 12th clause of the 4 & 5 Vic., ch. 91, will bear the plaintiffs out, and so also the 11th section and 22nd section of the 3 Wm. IV.

The questions are, could the covenant be properly taken in 1852 in a different form from that given in schedule B., in the 3 Wm. IV., ch. 8—*i.e.*, without limitation as to time? I incline to think it could, and that in that respect the declaration does not shew the covenant to be bad. If that limitation as to time is not dispensed with, nor the form virtually changed by the repeal of the 6th clause, then I should say the declaration would undoubtedly be bad, for not shewing that the breach complained of was within the four years, or setting out such facts as could shew that if not within the four years the defendants were yet liable for it by reason of no new covenants having been given by the sheriff, for the 3 Wm. IV. keeps up the liability of the covenantors till a new covenant has been filed. But on this latter ground my opinion, as I have already stated, is in favour of the plaintiff.

On the first point I regret that I do not see my way clear in holding the covenant in force upon the change of office. The sheriff should have been called upon, I think, to give new securities, and if he had been, then I conceive these defendants would, under the provisions of the statute, have continued bound for any defaults that occurred before the new covenant was entered into.

I think there should be judgment for the defendants.

MCLEAN, J.—The objection taken to the validity of the covenant declared on appears to me to be well founded. It was given on the 19th of May, 1852, as alleged in the declaration, but it could not then have been given under the

act 3 Wm. IV., ch. 8, as the declaration alleges. If executed under that act it could only be in force for a period of four years from its date, which time would expire on the 19th of May, 1856, and the plaintiff's writ for the arrest of Charles W. Robertson, for whose escape as an act of misconduct the action is brought, was not issued till the 21st day of December, 1857. The defendants could not therefore be liable as sureties for any act of misconduct committed after their bond had expired. The security given in 1852, must have been in pursuance of the act 4 & 5 Vic., ch. 91, by the 12th section of which the 6th section of the 3rd Wm. IV., ch. 8, which required the bonds and covenants of sheriffs to be renewed every four years, was repealed. The covenant declared on is alleged to bear date on the 19th day of May, 1852, and continued in force until the dissolution of the union between the counties of Middlesex and Elgin, in September, 1853. It is alleged that from thenceforth James Hamilton continued to be sheriff of the County of Middlesex, but there is no allegation that the *covenant* entered into for the performance of the duties of sheriff within the *united counties* continued in force for the same purpose within the County of Middlesex alone. It is left to be inferred that the security having been given for the united counties necessarily continued good by reason of the sheriff continuing to hold the office in *one* of those counties. Upon this inference the breach of covenant assigned is, that *the defendants have not kept the said covenant* so by them made as aforesaid, that the said James Hamilton should not after the date of the said covenant, and *while he remained as such sheriff as aforesaid*, wilfully misconduct himself in the *said office* as sheriff. Now the covenant is that James Hamilton shall not wilfully misconduct himself while he remained as sheriff of the *united counties*, not that he should not wilfully misconduct himself while he remained sheriff of Middlesex. If the sureties only became responsible for the sheriff *while he remained sheriff of the united counties*, and that seems to be the extent of their liability, then it follows that as soon as he ceased to be sheriff of the united counties the sureties ceased to be responsible upon their covenant, and it would become necessary to furnish other security under the act

4 & 5 Vic., ch. 91. It may have been, and most probably has been considered, that the sheriff having given security for the performance of his duties in the united counties, was under no necessity to renew his covenant by reason of the union between these counties being dissolved, but such dissolution would *change* the *office* for which security was given, and the officer would no longer hold the *same* office, but a more limited one, with the same duties to be performed within a different and more contracted boundary.

By the covenant as set out in the declaration the defendants were sureties for the late sheriff while he filled that office in the *united counties*, but their responsibility is sought to be extended to a period and to misconduct which did not occur till four years and upwards after he ceased to be sheriff of the *united counties*.

I am not aware of any enactment which declares that upon the dissolution of the union between any two counties the sureties of the sheriff shall still continue liable when he becomes the sheriff of one only of these counties, and his position and the duties to be performed are materially affected and interfered with. No such enactment has been pointed out, and I believe that none such exists, and without such a provision I think the sureties are relieved from liability by reason of the change in the office, as well as by the terms of the covenant itself, which apply only to the time during which the late sheriff continued to be sheriff of the united counties.

BURNS, J.—I think that judgment upon the demurrer should be given for the plaintiffs.

First, with respect to the effect of the disunion of Elgin from the County of Middlesex. When the legislature abolished the divisions of district and substituted the territorial division of counties, by statute 12 Vic., ch. 78, it was enacted by the third section of the act, after declaring that the offices and officers of the district shall have the denomination of offices and officers for the county, as follows: "*and all laws at present in force, or during the present session of parliament made or to be made applicable to the said division of territory by the name of districts, or the courts, offices, or*

other institutions thereof, shall be applied to, and have the same operation and effect upon the said counties and their respective courts, offices, and other institutions as counties."

Under this provision I apprehend the sureties of the sheriff, taken under 3 Wm. IV., ch. 8, continued in respect of the office. No alteration or change was made in the office or duties of sheriff, and the extent of territorial jurisdiction remained the same. The legislature had this statute present to their mind when passing the other, for the 17th section provides for a sheriff appointed to a junior county when set off, not being obliged to give his sureties before receiving the appointment, but giving him six months after his commission for the purpose. Under ch. 78, the district of London was constituted the county of Middlesex, and by 14 and 15 Vic., ch. 5, Middlesex was divided into two counties, Middlesex and Elgin, but remained united for judicial purposes. For the purpose of deciding this case, we must take it as if the sheriff (Hamilton) had been appointed sheriff of the United Counties of Middlesex and Elgin, for it was as such the covenant sued upon was given. Of these counties Middlesex was the senior, and Elgin as the junior was disunited from it. We find in both of the Territorial Divisions Acts that appointments of judge, surrogate, sheriff, &c., were to be made for the junior counties when they should be disunited from the senior county, but not a word is said about any new appointments to be made for the senior county, which remains entitled to the court house, courts, &c. I apprehend, therefore, no new appointment was required for the offices and institutions of the senior county, when the other declared off. Then, when we look at the provision of the 3 Wm. IV., ch. 8, we find the obligation of the sheriff and his sureties is attached to the office of sheriff, and it is by virtue of the office they become liable for moneys not paid over or for misconduct of the sheriff. It must be taken for granted that when the defendants entered into the bond sued on they knew the law was that Elgin, the junior county, might be disunited by the provisions enabling it to do so, at any period over which their obligation might extend, and that, when it did, the provisions of the 28th section of ch. 78, would be in force, namely, "*none of the courts or officers of the senior*

county, or of the union, shall as such have any jurisdiction or authority whatsoever in or over the said county so dis-united from such union as aforesaid." Now it seems to me that defendants' covenant being connected with the office and not with territory, as I take it, it is subject to such changes with respect to territory as the legislature enabled the union of counties to effect. This is not the case of the legislature adding a portion of territory to the office of sheriff, thereby increasing his duties and responsibility after the covenant was entered into without the consent of the sureties, neither is it the diminishing by the legislature of the territory without the consent of the sureties. The power to dis-unite existed at the time the defendants entered into the bond, and that power was vested in the junior county ; and the defendants must, I think, be supposed to have entered into the covenant subject to that contingency, and when that contingency did happen their security for the sheriff followed the office, and remained with the senior county.

In *Pybus v. Gibb*, 6 E. & B. 902,) Lord Campbell says : " It may be considered settled law that where there is a bond of suretyship for an officer, and by the act of the parties, or by act of parliament, the nature of the office is so changed that the duties are materially altered, so as to effect the peril of the sureties, the bond is avoided." This proposition is laid down as the result of the case of the Mayor, Aldermen, and Burgesses of Burwick-upon-Tweed v. Oswald (1 E. & B. 295 ; 3 E. & B. 653, and 5 H. L. Cas. 856.) If the nature and functions of the office be changed, then it is not the same office within the meaning of the covenant ; but if not, and if the tenure only be changed, the sureties will continue liable.

In the case before us the facts are not like either of those quoted. The legislature neither added to nor diminished the territory over which the sheriff's jurisdiction extended after the defendants entered into this covenant. The law then stood that the sheriff's duties, and consequently his liabilities, might be diminished whenever the county of Elgin desired to separate from the other, and so far the risk to the sureties was, I think, lessened, and it might be considered

an advantage to them. The question, however, is this : did the separation of Elgin from Middlesex effect a change in the nature, functions and employment of the sheriff (Hamilton) which might effect the sureties? The name was changed, undoubtedly, from sheriff of those united counties to that of sheriff of Middlesex, but the changing of the name would not of itself have had the effect of discharging the sureties. Something more than mere change of name would be required. The functions and duties to be performed were not increased; on the other hand, they must have been diminished. Will the diminishing of the sheriff's duties by an act done after the sureties entered into the covenant with full knowledge that such was the law, and that it might be done, have the effect of discharging them? If this alteration had been by the legislature after the covenant made, not a matter contemplated by the sureties, perhaps it might have discharged the sureties. I am not prepared to say it would, but this covenant was entered into by the defendants knowing that the territorial bailiwick might be diminished, and the risk they ran lessened. I do not think *that* is such a varying or altering of the office, as to make it a different office. In the case of the Mayor, &c., of Berwick v. Oswald (3 E. & B. 678), Pollock, Chief Baron, says this, "I think every contract (which does not *expressly* provide to the contrary) must be considered as made with reference to the existing state of the law; and if by the intervention of the legislature a change is made in the law, which in any degree affects the contract, such contract, made without some clear and distinct reference to the prospect or possibility of a change, does not hold with reference to the state of things as altered by the new law."

One thing, which should, I think, be borne in mind, in applying all the cases which may be cited to the present, is that the plaintiffs who sue upon the covenant in question are not parties to it, and had nothing whatever to do with making or seeing that it was done. Therefore, there was no alteration of it by any dealing between the parties which would make it afterwards not such a contract as the sureties entered into, and there was no dealing with the office by the

sheriff himself, which brought about or made any alteration or variation of his duties and functions. The legislature has done nothing since the covenant was made ; whatever might affect the office existed at the time, and in my judgment the taking away of the County of Elgin from the Sheriff's jurisdiction did not change the office, so as to avoid the covenant then existing, which covenant was directed by act of parliament to be given, and the right to sue on it conferred by the legislature.

Secondly, with regard to the objection that the security was limited only to four years, there is nothing in the declaration to shew that there is any limitation in respect to time. The 6th section of 3 W. IV., ch. 8, obliged all sheriffs to renew their covenants with sureties every four years, and the 19th section provided for their removal from office if they did not do so. Both of these sections were repealed by the 12th section of 4 & 5 Vic., ch. 91, though the schedule containing the form of the covenant had not been altered, and in that form the expression still appears, that the covenant is to be to the expiration of four years from the date. The second section of the act, however, says that the covenant is to be in that form, or in words to the same effect, and when the legislature expressly repealed the clause obliging the sheriffs to renew the covenant every four years, the obvious effect was, I think, to say the covenant might then be silent as to time, and in that case the one set of sureties would remain liable until another set were obtained and approved of, in case of any change, and that, I think, without reference to time. The case of the Mayor, &c., of Birmingham v. Wright (16 Q. B. 623), supports holding that the covenant no longer was for four years to four years, unless it had been so on the face of it.

Thirdly, no doubt, to enable a person to maintain an action on a sheriff's covenant, the declaration should shew that the sheriff *wilfully misconducted himself in his said office*, to the damage of the person complaining. What is charged in this declaration is that to delay and hinder the plaintiffs in and from the recovery of their debt, and without the leave and license, and against the will of the plaintiffs,

the sheriff voluntarily and negligently suffered and permitted the debtor to escape and go at large, without doing what was required, or obeying the writ. I cannot draw any distinction between a thing done voluntarily and done wilfully. They both comprehend that which is done designedly, and if the sheriff voluntarily suffer and permit an escape from design, he must be said to have allowed it by his express consent, or, in another word, wilfully.

The defendants have pleas enough upon which to test their liability, and some of them embracing the points made by this demurrer, and if the sheriff did not act wilfully, and that can be established, the defendants may be in no danger of being made to pay, where the law would excuse them.

Judgment for defendants on demurrer.

BURNS, J. dissenting.

ROBERTSON V. BANNERMAN.

Ejectment—Landlord and tenant—Estoppel.

The land in question had been granted to the plaintiff's wife, and during her lifetime he had allowed defendant to occupy. She afterwards died without having had children, and the plaintiff brought ejectment. *Held*, that he could not recover, for defendant was not estopped from shewing that the plaintiff's title had expired.

This was an action of ejectment to recover the west half of lot 17, in the 6th concession of the township of Ramsay.

The defendant only defended for all that part of the land lying to the east of a certain creek which ran through the land mentioned.

The plaintiff, by his notice of claim attached to the record claimed title by devise from Christian Robertson, widow of one Crawford Gunn, also by right acquired by his intermarriage with the said Christian, now deceased; and that the plaintiff and Christian in her lifetime, permitted the defendant to occupy the premises under the plaintiff as tenant at will, which was put an end to before the commencement of the suit.

The defendant by his notice denied the plaintiff's title, and claimed title in himself by descent from Christian Robertson.

The trial took place before *Richards, J.*, at Perth, and the facts proved were as follows: on the part of the plaintiff it was shewn, that the defendant came to live with the plaintiff about fourteen or fifteen years ago, and that the plaintiff caused to be erected a log house on the north-east corner of the lot, to which house the defendant removed, and there had continued ever since. He occupied this by the plaintiff's permission, and in May, 1856, the defendant stated that he had no claim on the lot: that the plaintiff had allowed him to occupy until he could get a better place. On the 22nd of April, 1857, the plaintiff demanded possession. On the part of the defendant it was proved by the defendant examining the plaintiff, that the land was granted to his wife, who was formerly Mrs. Gunn: that she was in possession when he married her: that she had never had any children by her first husband, Gunn, nor any by the plaintiff, and that she died about four years ago. Mrs. Robertson's father and mother died long before her death. There were five brothers and one sister of Mrs. Robertson. The defendant was a son of that sister, and she died, as also two of her brothers, before the death of Mrs. Robertson. One of the brothers died leaving five children.

On this state of facts the learned judge directed a verdict to be entered for the plaintiff, and reserved leave to the defendant to enter a verdict in his favour if the court should be of opinion that the defendant could set up as a defence that he was entitled to remain in possession as one of the co-heirs of Mrs. Robertson, though he had said in his notice of claim that he claimed by descent from Christian Robertson, and also if the plaintiff's claim to the possession was put an end to by the death of his wife under the circumstances.

Richards, Q. C., obtained a rule to enter a verdict for defendant according to the leave reserved.

Prince shewed cause, and cited *Doe Knight v. Smythe*, 4 M. & S. 347; *Doe Bullen v. Mills*, 2 A. & E. 17; *Doe Johnson v. Baytup*, 3 A. & E. 188; *Doe Bord v. Burton*, 16 Q. B. 807.

BURNS, J., delivered the judgment of the court.

This case does not come within the rule established by the class of cases cited by the plaintiff's counsel, namely, that a tenant shall not be allowed to dispute his landlord's title. The defendant no doubt was tenant at will to the plaintiff at the time he was first let into possession of the premises, but since that time the plaintiff has himself ceased to have title. His title was only in right of his wife, and as he did not become tenant by the curtesy, his right to the possession became extinct at her death. The case therefore comes within that class of cases which establish that the tenant, though he cannot dispute his landlord's title, yet may shew that it has terminated.—*England dem Syburn v. Slade* (4 T. R. 682), *Doe dem. Jackson v. Ramsbotham* (3 M. & S. 516), *Hopcraft v. Keys* (9 Bing. 613), *Doe v. Barton* (11 A. & E. 314), *Mountnoy v. Collier* (1 E. & B. 630.)

The defendant clearly was at liberty to shew this fact under his notice, even supposing that he ought to give one, for he has denied the plaintiff's title to the premises. It appears the defendant is entitled to a portion of the premises as yet undivided, but that is of no consequence, for the plaintiff fails to establish his own title at the commencement of the action, for though the parties stood in the relation of landlord and tenant as long as the wife of the plaintiff lived, yet that relation ceased at her death. The rule must be made absolute to enter the verdict for defendant.

Rule absolute.

WISMER V. THE GREAT WESTERN RAILWAY CO.

Bridge over the Twenty Mile Creek—18 Vic., ch. 176—Former recovery—Limitation of action.

Held, that after the 18 Vic., ch. 176, the plaintiff could not maintain an action against the defendants for unlawfully and wrongfully erecting a bridge across the Twenty Mile Creek, and impeding the navigation, for the statute expressly authorises such erection, and gives only a right to compensation for damage sustained.

Per Burns, J., a prior recovery for injury sustained by the erection of the bridge was a bar to this action.

DECLARATION—first count: That long before, and at, and ever since the grievances complained of, the plaintiff was possessed of a certain portion of lot No. 19, in the 3rd con-

cession of the township of Louth, and of certain warehouses situate thereon, and of certain wharves leading therefrom of right to and into the Twenty Mile Creek, flowing through and from the said lot, and the part thereof so possessed by the plaintiff, into lake Ontario: that up to the time of the said grievances by the defendants, the said stream of water had been and was navigable, and used for purposes of commerce by vessels and boats from lake Ontario up to and beyond the said land, store-houses, and wharves, and from thence down again to the said lake, and had been used to run and flow, and during all that time of right ought to have run and flowed, and still of right ought to run and flow, and but for the committing by the defendants of the said grievances would have continued to run and flow, and would still run and flow through the said parcel of land of the plaintiff, and from, by, and past the said store-houses and wharves, in its natural course and channel, free from any interruption or obstruction that would in any way impair or interfere with the use and navigation thereof by vessels of any description capable or fit for navigating or using the same: that the plaintiff carried on at the said wharves and store-houses the business of a wharfinger, and vessels and steamboats, &c., were daily accustomed, and of right to navigate the said stream, laden with goods, &c., and to stop at the said wharves, and land such goods there, under the charge of the plaintiff, as such wharfinger, &c., and to carry and take away from the said wharves divers goods, &c., that the said plaintiff had been doing, and but for such grievances would have continued to do a large and profitable business as such wharfinger; and although the plaintiff had erected and maintained the said store-houses and wharves for the purposes of such business, and still retained the same, yet the defendants well knowing, &c., but contriving, &c., heretofore, to wit, on the 1st of June, 1852, wrongfully and unlawfully erected, put and placed, on, over and across the said stream, between the said land, wharves and store-houses of the plaintiff and the lake, and have hence hitherto wrongfully and unlawfully continued so erected, a certain bridge between the banks of the said stream, in such a position that

thereby the navigation of the said stream was then, and has ever since been interrupted and impeded, and to such an extent that vessels such as had as aforesaid been theretofore accustomed to navigate the said stream, and pass and repass thereon between the said lake and the said parcel of land, store-houses and wharves of the plaintiff, have from thence hitherto been prevented thereby from so passing or repassing, and by means thereof all communication along the said stream, between the said wharves and the said parcel of land of the plaintiff, and the said lake has been stopped, whereby, and by means of which, the plaintiff has not only been deprived of the profits of his business, and of the advantage of the navigation of the said stream, but the said store-houses and wharves have become of no value, and the said parcel of land had become deteriorated in value.

First plea : That the defendants are the company mentioned in the 4 W. IV., ch. 29, 8 Vic., ch. 86, 9 Vic., ch. 81, and 16 Vic., ch. 98 ; that before the passing of the said last mentioned act, and after the passing of the said three firstly mentioned acts, and in the month of June, 1852, in the plaintiff's declaration mentioned, it became necessary for the defendants, in the exercise of the powers in them vested by the said three firstly mentioned acts, to carry and construct their railway across the stream of water in the plaintiff's declaration called the Twenty Mile Creek, and therefore, they the defendants, at the time in the plaintiff's declaration in that behalf mentioned, did erect, put, and place the bridge in the plaintiff's declaration mentioned, at the place in such declaration mentioned, and below the lands of the plaintiff in his said declaration mentioned, doing no unnecessary damage thereby, and the defendants have since used and maintained the said bridge, as and for the road bed of the defendants' railway, across the said stream ; and the defendants then constructed the said bridge as a permanent structure, without any draw or swing therein, under the belief that the said stream at the place where it was so crossed by the said bridge was not a navigable stream, and the defendants obstructed the passage of masted vessels only, to and fro on the said stream, between Lake Ontario and the lands and premises of the plaintiff in

his said declaration mentioned ; and the defendants say that the said stream, at the place where it was so crossed by the said bridge, was made navigable for, and capable of being traversed by, such masted vessels from and to the said Lake Ontario solely by the works of a certain company, incorporated under the name and style of the President, Directors and Company of the Louth Harbor, under the 3 Wm. IV., ch. 22 ; that after the erection of such bridge by the defendants, by the 18 Vic., ch. 176, after reciting among other things that, " whereas the said company (being the defendants) have caused a permanent bridge to be erected for their road across the stream known as the Twenty Mile Creek in the township of Louth, not considering the said stream at the place to be a navigable stream, and doubts have been raised as to their authority at law so to do ; and whereas the municipality of the said township have petitioned parliament to confirm the right on the part of the said company to build and maintain such permanent bridge," it was enacted and declared that the said company, being the defendants, were and are fully authorised and empowered to build and erect such permanent bridge, and to maintain, rebuild, renew and keep in repair such permanent bridge in all time to come ; but that nevertheless it shall be the duty of the said company in such case from time to time to indemnify all parties whose private rights shall hereafter be, or may have been injured thereby, if any there be, for such actual damage, if any, as they shall have sustained by reason of the erection and maintenance of such permanent bridge, to be recovered by action at law : that after the passing of the said last mentioned act, in a certain action theretofore brought by the plaintiff against the now defendants in this court, wherein the said plaintiff declared against the now defendants for the erection and maintenance of the same identical bridge as in the plaintiff's declaration is mentioned, and in which declaration in the said former action it was alleged, &c., &c., setting out the allegations there, being the same in effect as in this case, he, the said plaintiff, on the eight day of March, 1856, by the judgment of the said court, recovered in the said former action against the now defen-

dants the sum of £105, for all the damages sustained by the plaintiff in respect of his said parcel of land, storehouses, wharves and business, by reason of the erection of the said bridge by the defendants, and of the several grievances in the plaintiff's declaration in the said former action mentioned and of the injury which the said plaintiff's private rights had sustained by reason of the erection of the said bridge, together, with the sum of £58 13s. 11d. for the plaintiff's costs of the said action, amounting to £163 13s. 11. as by the record, &c., will appear. That after the recovery by the said plaintiff of the said judgment, they, the defendants, paid to the plaintiff the said sum of £163 13s. 11d., in full satisfaction and discharge of the said judgment, and of the amount thereby recovered, and of the damages by the said plaintiff sustained by reason of the erection of the said bridge. That the said bridge in the former action mentioned, the erection of which is therein complained of, is the same identical bridge as the bridge in the plaintiff's declaration in this present action now pleaded unto, and in the said act of parliament, 18 Vic., ch. 176, mentioned, and that the erection thereof, in the plaintiff's declaration in the said former action mentioned and therein complained of, is the same erection in the plaintiff's declaration in the present action now pleaded unto, and in the said act mentioned; and that the land, store-houses, wharves and premises respectively, are the same.

Third plea, that the bridge and the erection thereof by the plaintiff in his said declaration complained of, is the same bridge and erection thereof as the bridge and the erection thereof in the second plea hereinbefore mentioned, and as the bridge and the erection thereof in the said act, 18 Vic., and that the said bridge was erected by the defendants for the purposes of their railway as in the said second plea is mentioned, and in the exercise of the powers in the defendants vested by the several acts of parliament in the said second plea recited; and the defendants say that the plaintiff's present action was not brought or commenced within six calendar months next after the passing of the said act of parliament.

Replication to the first plea, that it is true that the said former action was so commenced and prosecuted as in that plea alleged, and the bridge, &c., in that plea and in the said former action referred to, are the same as those referred to in this cause ; nevertheless, that the damages sought to be recovered in this action are other and different than those recovered in the said former action—that is to say, damages which have accrued since the said recovery—and have been occasioned by the wrongful, unlawful and negligent continuing by the defendants of the same bridge and erection for a period of time subsequent to the day to which the damages in the said former action were computed.

To the third plea, that though this action was not brought or commenced within six calendar months next after the passing of the said act of parliament, that it was commenced within six calendar months next after the defendants maintained and continued to maintain the said bridge, and to cause a continuance of the damages in the declaration complained of.

Demurrer, to both replications, on the grounds, as to the replication to the first plea, that it contains no answer to the matters of justification in the said plea pleaded ; that it admits the matter of justification pleaded by the defendants in their said plea, which matter is a complete bar to the plaintiff's action ; that the said replication treats as unlawful and wrongful that which by the plea is alleged and shown to have been, and by the replication is admitted to have been, lawful and rightful.

As to the replication to the second plea, that the act complained of is by the third plea of defendants alleged and shewn to have been lawful, and the continuance of what is lawful gives to the plaintiff no cause of action ; that the continuance by the defendants of the structure complained of does not give to the plaintiff a continuing cause of action : that the matters alleged by the third plea, and admitted by the replication thereto, constitute a complete bar to the plaintiff's present action.

Gwynne, Q. C., and *Irving*, for the demurrer, cited *Nicklin*

v. Williams, 10 Ex. 259; Patterson v. Great Western R.W.Co., 8 C. P. 89; Jarvis v. Great Western R. W. Co., 8 C. P. 115.

Eccles, Q. C., contra.

The statutes bearing upon the question are referred to in the judgments.

ROBINSON, C. J.—The statute 18 Vic., ch. 176, was passed after the actions were brought of Snure v. the Great Western Railway Company (13 U.C. R. 376), and of this same plaintiff, Wismer, against the same defendants (*Ib.* 383), and it is probable, as it was said on the argument of this case, that it was passed in consequence of those actions.

The 25th clause of that act creates a peculiar state of things as respects the cause of action which the plaintiff is declaring upon in this suit. It enacts and declares that these defendants "*were and are fully authorised and empowered to build and erect the permanent bridge over the Twenty Mile Creek in the Township of Louth,*" which is now complained of, "*and to maintain, rebuild, renew, and keep in repair such permanent bridge in all time to come: but that nevertheless it shall be the duty of the said company in such case from time to time to indemnify all parties whose private rights shall hereafter be or may have been injured thereby, if any there be, for such actual damage, if, any, as they shall have sustained by reason of the erection and maintenance of such permanent bridge, to be recovered by action at law; and that it shall also be in the option of the said company at any time, if the directors shall think fit, to construct, keep and maintain a draw or swing in such bridge, so as to admit the free passage up and down the said stream of such vessels and craft as may have been accustomed to navigate the same; and thenceforward, and so long as the said company shall keep up and maintain such draw or swing, they shall not be liable to any claim or demand for damages by reason of the erection and maintenance of such bridge across the said stream.*"

This is a provision in a public act of parliament particularly relating to the bridge whose erection and continuance is the subject of this action, and we should be bound to pay atten-

tion to its provisions even if they had not been spread out upon the record, as they are in the first of the pleas demurred to. I do not think that we can, in the face of the enactment, allow the plaintiff to recover upon a declaration which complains of this bridge as having been unlawfully and wrongfully erected and continued, when the statute expressly enacts and declares that the company were and are fully authorised to erect and maintain it; and in which declaration it is also averred, contrary to the plain words of this statute, that the plaintiff had and still has a right to have the water of the said stream run and flow through his land without any such obstruction to the navigation thereof by vessels as is occasioned by the bridge complained of.

The statute makes that lawful which the plaintiff complains of as unlawful, and though the plaintiff may have a right of action against the defendants, it can only be a right of action under the statute for not making compensation for any injury the plaintiff may have suffered, he cannot treat the defendants as wrong-doers in putting up or continuing the bridge, and we cannot consistently with the act adjudge them to be wrong-doers in that respect.

The only wrong the defendants can have committed in the matter is the not compensating for any injury which the bridge may have occasioned to the plaintiff, and that should have been the only wrong complained of. The action should have been put upon its proper footing.

In my opinion the judgment should be given against the plaintiff upon both the demurrers, on the ground that it appears to us upon the record that the action in its present form cannot be sustained consistently with the statute.

Whether after the recovery in the former action the plaintiff can sustain this second action for a further injury alleged to be suffered by him from the continuance of the bridge, and whether he is barred by lapse of time from suing for such further injury, are, as it seems to me, in effect the same question, although in different forms, and I will only say now that I have not at present come to any conclusion against the plaintiff upon those points.

BURNS, J.—Whether, if the statute 18 Vic., ch. 176, had not been passed, the erection of this bridge in question over the Twenty Mile Creek would have been considered to be a nuisance, and as such it could be considered of a continuing character, so that at whatever time the plaintiff could shew that he had sustained a consequential injury, within six months before the commencement of his action, he could recover, we need not enquire. The 25th section of the act, legalises the placing of the structure over the stream. The proviso preserves to parties whose private rights then were injured, or thereafter might be, the right to compensation or to be indemnified, by reason of the erection of such permanent bridge.

The plaintiff brings the action on the ground that keeping the bridge in the same state as when erected is a continuing injury to him, and that he can maintain an action every time he can shew a consequential damage to him arising from it.

On the other hand, the defendants rely upon two grounds as an answer to the action. 1. That the plaintiff brought an action for the same thing, and recovered damages, which the defendants paid, and that one recovery is a bar to any other in a case like this; and, 2nd. That it is several years since the bridge was erected, and that the limitation of the action commences to run from the time of the erection of the bridge which has been rendered a lawful act, and cannot be treated as a nuisance, and not from the time that the plaintiff may have sustained a damage.

I am of opinion the defendants are right in the view they take of their liability. We see by the declaration the plaintiff complains that the defendants, in June, 1852, obstructed the navigation of the stream by means of the bridge, and have continued to do so ever since, and thereby prevented vessels navigating from and to his wharves and premises, situated higher up the stream than the bridge, from Lake Ontario. He states that vessels were accustomed to ascend to the wharves and descend again, and that he was accustomed to receive wharfage fees and dues, which he has been prevented from taking because vessels cannot get to his pre-

mises. The whole narrative of the plaintiff shews that he considers his *right* to use the stream as impeded by the first act of the defendants, but he now seeks compensation for consequential injury arising from that act, subsequent to the time the act has been legalised by the legislature. He cannot complain of the erection of the bridge as being a wrongful act *per se*. It only becomes wrongful, as he says, because it prevents him from making the gains he was wont to do from the wharfage at his premises. Is this not an injury to a right to be compensated for by one recovery? I think it must be so considered. It comes within the rule of *Fetter v. Beale* (1 Salk. 11, 1 Ld. Raymond 339), and as affirmed in *Nicklin v. Williams* (10 Ex. 259.) Baron Parke, in delivering the judgment of the court, says, "The plaintiffs would have a right to recover a full compensation, including the probable damage to the fabric; and if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong." The case of *Nicklin v. Williams* has recently received confirmation from the Queen's Bench, in *Bonomi and wife v. Backhouse* (32 Law Times 156). It is true Mr. Justice Wightman dissented from the judgment in the Queen's Bench, and is reported to have said that he was not satisfied with the judgment of the Court of Exchequer; but the rest of the court take a different view and affirm that decision, and held that one recovery for damages sustained by reason of an injury to a right, must be taken to be a satisfaction in full, and that the plaintiff cannot treat the injury as a continuing one, giving him an action *de die in diem*. Where the question is as to a nuisance, then every continuance of the nuisance is a fresh nuisance, but that proceeds upon the act being wrongful in the first instance, and continuing so. Here, the continuance of this bridge is lawful, and whatever injury the plaintiff may sustain from it must be taken to arise from its erection, and therefore one compensation must be for all time to come, just as much as if the defendants had injured the plaintiff's farm by depriving him of something in the construction of the railway which was an adjunct of the farm.

Besides this, if the plaintiff be entitled to maintain any

action, I apprehend it would not be an action as for a nuisance in continuing the bridge, but it would, I apprehend, be an action for not making him compensation, and treating the matter as the interference with a *right*, one recovery must be taken to be a compensation for his right. I apprehend the legislature, in imposing the duty upon the company from time to time to indemnify all parties whose private rights should have been or might thereafter be injured in consequence of the bridge, did not mean to preserve a right to the parties to treat this bridge as a nuisance, but simply to give those who had a right to complain of the first erection, or those whose rights might from time to time be discovered to be injured, as those rights might be called into existence, by the erection or maintenance of the bridge, a right to call upon the company for compensation for the actual damage sustained.

MCLEAN, J., concurred.

Judgment for defendants on demurrer.

HARRIS V. STRATTON.

Dower—Non-tenure.

Since the 13 & 14 Vic., ch. 58, the same persons are liable to an action of dower as before, and non-tenure is therefore still a good defence.

ACTION for dower. *Plea*—That the said C. S. cannot render to the said demandant her dower in the said lands mentioned in the said declaration or plaint, because he says that he, the said C. S., is not, nor was at the time of the commencement of this suit, nor has he at any time since, been the tenant thereof, or of any part thereof as of freehold.

Demurrer, on the following grounds :

1. That there are by the 13 & 14 Vic., ch. 58, two classes of tenants against whom actions of dower may be had, namely, tenants of the freehold and tenants of the land, and the said tenant does not deny but that he is tenant of the land.

2. That the said tenant does not deny by his said plea but that he is tenant of the land, and the tenant of the freehold out of the jurisdiction of this honourable court.

3. That said plea only denies that said tenant is tenant thereof as of freehold, or of any part thereof as of freehold, which is not an answer to the action, because he may be tenant of the land as occupier thereof.

4. That he does not deny but that he is the occupier of the land, if not the terre tenant.

M. R. Vankoughnet, for the demurrer.

Campbell, Q. C., contra.

ROBINSON, C. J.—The demandant in this case has demurred to the ordinary plea of non-tenure, assuming that since our statute 13 & 14 Vic., ch. 58, it can no longer be a sufficient plea in an action of dower, for that statute, it is contended by the demandant, gives her a right to bring her action against any mere occupant of the land out of which she claims dower, and therefore a plea by the tenant or defendant, disclaiming to be tenant of the freehold can be no defence.

I think it clear that this is taking an erroneous view of the intention and effect of the statute, which meant nothing more in this respect, than that the declaration in dower which must be against the tenant of the freehold, as before may be served upon any tenant or occupant of the land, in case the tenant of the freehold shall be out of the jurisdiction of the court. It does not authorise the action being maintained against any but the tenant of the freehold, who alone can assign dower. The provision respecting notice shews that clearly enough, for most certainly no mere occupant, having no freehold interest in the land, is competent to assign dower, and it would therefore be most unjust to subject him to costs because he did not comply with the notice, and offer to do that which he had no power to do.

The second clause of the act is not accurately expressed, instead of, "and if such tenant do not plead agreeably to the notice," it should have been, "and if such tenant *of the freehold* do not plead agreeably to the notice," for no doubt it was meant that the action should be against him; but the word "tenant," as it stands there in the clause, may naturally be referred to the tenant of the land upon whom the decla-

ration has been served in consequence of the absence of the tenant of the freehold. The following clauses of the act, and especially the 3rd and 6th, shew clearly that the legislature were not making such a change in the law of dower as to allow the suit to be maintained against any one who is not a tenant of the freehold.

I am of opinion that the tenant must have judgment upon this demurrer, for that his plea of non-tenure is sufficient.

BURNS, J.—The statute 13 & 14 Vic., ch. 58, has not been guardedly worded, but still I think it sufficiently appears what the legislature meant. They only intended to alter the practice of the law in actions of dower, as the title of the act says, and not to alter the law of dower. It is only the tenant of the freehold who can effectually assign dower, and the last section of the act makes the recovery of dower against an occupier of the land of no more effect than a recovery in ejectment would be. As the law stood at the time of the passing of the act, a mere occupier or tenant of the land could not be called on to assign dower, and if the writ were directed to, and served upon, a person in such a position, a plea in abatement of non-tenure was a good defence, if true. In this case the demandant has named the defendant as the person who is liable to her for an assignment of dower, and in doing so she assumes that the defendant, whether tenant of the freehold or of the land, is liable to assign the dower. If he were, that would be an alteration of the law itself, and not the practice. If the dowress could not ascertain who was the tenant of the freehold, her course was to file a bill of discovery, and thus find the person against whom she should bring her writ. One act altered the practice, and allowed her to serve her declaration, which included the writ, upon the tenant of the land, or if the land were vacant, and the tenant of the freehold could not be personally served, she might then proceed as in ejectment, to recover upon a vacant possession. The tenant of the freehold, if within the jurisdiction of the court, must be served, but if not within the jurisdiction then service of the declaration upon the tenant of the land will be sufficient. The demandant treats this

as authorizing her to make the tenant of the land the defendant, or as in the position of *terre tenant*. I do not think such was the meaning, for if so, then the plea of non-tenure in abatement would be abolished, and every tenant, though having no interest whatever in the freehold, would be subject to the action, and would be subject to costs, for he never could comply with the demand to assign within a month.

What the legislature meant, I think, was undoubtedly this—that if the dowress could not serve the tenant of the freehold with the declaration, then that the declaration might be served upon the tenant of the land, but still the declaration would be against the person who in law would assign the dower. The words of the fourth section are those which may be supposed to create the inconsistency, but upon a careful examination I do not think they do, and I look upon that section as being still a provision carrying out those of the third section: namely, where there may be a vacant possession. The expression “whenever the tenant of the land shall not be personally served,” has reference to what precedes; that is, where land is occupied the dowress proceeds against the tenant of the freehold, but may, in case the tenant of the freehold be without the jurisdiction, serve her declaration upon tenant occupier of the land, and if neither of these be done, then, proceeding upon a vacant possession, at the trial she shall be obliged to prove what the fourth section declares shall be proved. If she can serve the tenant of the freehold she must do so, and if she cannot, but serves the declaration on the occupier, then she proceeds as in personal actions. We must presume, however, that whoever she has named in the declaration as the person who should assign the dower, he is tenant of the freehold, for if we do not assume that to be so, it would follow that if a square of a city, for instance, were all built over and leased to hundreds of tenants, though the whole belonged to one person as tenant of the freehold, yet each tenant of every sub-division of it would be liable to the action of dower.

The plea is a good answer in abatement of the action against the demandant.

MCLEAN, J., concurred.

Judgment for defendant on demurrer.

LANGE V. THE MUTUAL INSURANCE COMPANY OF
PRESCOTT.

Insurance—Affidavit of loss and magistrate's certificate.

Held, that the affidavit of loss, and the justice's certificate, set out below, were clearly not in compliance with the conditions indorsed on the policy, and that the plaintiff therefore could not recover.

Held, also, that Mutual Insurance Companies are not precluded from making such conditions.

ACTION upon a policy of insurance dated 9th November, 1857, commencing the risk on the 6th of November, and continuing to the 6th of November, 1858, covering £75, on a stock of millinery goods, furniture, clothing and provisions, contained in a wooden building occupied by the plaintiff as a milliner's shop and dwelling, and owned by Robert Augur; and also £75 on certain other goods and property described in the policy as ready-made clothing, furnishing goods and furniture, also contained in the same building. In case of loss, the company to be liable to pay two-thirds. The premises were situate on Rideau street in the city of Ottawa, and alleged to have been destroyed by fire on the 14th of March, 1858.

Pleas—I. *Non est factum.*

2. That the policy was obtained from the defendants by fraud.

3. That the property was not accidentally destroyed by fire.

4. That at the time of the fire the plaintiff had not, as stated in the declaration, property of the actual cash value of £225.

5. That the proof of the loss was not made or given as alleged.

6. That the policy was made upon certain conditions indorsed on the policy, and in the 7th condition it is set forth, "that members sustaining loss or damage by fire shall forthwith give notice to the directors or secretary, and shall within thirty days after the same shall have occurred, deliver in an account of the particulars or amount of such loss or damage, shewing also what was the value of the subject assured; in what general manner as to trade, manufactory, merchandise, or otherwise, the building assured, or

containing the subject assured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they know or believe." Nevertheless, the plaintiff did not within thirty days after the alleged loss, make proof, &c., as required.

7. That the policy was subject to other conditions, that the parties sustaining loss should produce a certificate under the hand and seal of a magistrate most contiguous to the place of fire, and not concerned in said loss, stating that he has examined the circumstances attending the fire, loss, or damage alleged : that he is acquainted with the character and circumstances of the assured or claimant ; and that he verily believes that he, she or they, have by misfortune, and without fraud or evil practice, sustained loss or damage on the subject assured to the amount which the magistrate shall certify. The defendants alleged that the plaintiff did not produce a certificate under the hand and seal of a magistrate most contiguous to the alleged place of fire, as requested, and in accordance with the terms of the seventh condition.

Issue was taken.

At the trial, before *Richards, J.*, at Ottawa, the policy was admitted, and a great deal of evidence given to shew the value of the different descriptions of goods said to be burned. The plaintiff had left home for Montreal on the Wednesday previous to the fire, leaving at home his wife, and her mother, who had been living with her daughter during the winter. The fire occurred on Sunday, the 14th of March, while the plaintiff's wife and her mother were at church, but how they could not state. The mother swore that there was but one fire, that in the cooking stove in the kitchen, and that her daughter covered up the fire and sprinkled water on the floor before they went to church.

It appeared that a notice signed by the plaintiff, and dated on the 17th March, that the fire had happened, was served upon the agent of the defendants at Ottawa. The plaintiff, also, on the 22nd of March, furnished the defendants with affidavits of himself, his wife, and another person, as to the particulars of the loss. On the 25th of March, the secretary

of the company acknowledged by letter the receipt of these documents, but called the attention of the plaintiff to the necessity of complying with the terms of the seventh condition upon the policy, stating that it was necessary to obtain the certificate of a magistrate as therein directed, and that he should also produce his books of account, and when these were complied with his claim would be submitted to the directors. The plaintiff then furnished a certificate as follows :

"I, the undersigned, one of her Majeszy's Justices of the Peace for the city of Ottawa, hereby certify that I have examined the circumstances attending the alleged loss by fire of J. M. Langel, which occurred on Sunday, the 14th day of March, instant ; that I am acquainted with the character and circumstances of the assured, and that I verily believe that he has by misfortune, and without fraud or evil practices, sustained loss to the amount of upwards of eight hundred dollars. Signed and sealed this 27th day of March, 1858. (Signed) W. GLEGG, J. P.

"Witness—G. H. PRESTON."

[L.S.]

The statement of the particulars of the loss was accompanied by oath, as follows :

"We, the undersigned, J. M. Langel, and Jessie Langel, wife of the above-named J. M. Langel, hereby make oath and say, that the annexed inventory of property was in our possession on Rideau street in this city, at the time of the fire on Sunday, the 14th instant, and that to our knowledge and belief none of the said goods, &c., had been taken from the premises, the fire having occurred during the absence of the above-mentioned J. M. Langel in Montreal, and also at the time the said Jessie Langel was at Church.

"M. J. LANGEL.

J. LANGEL.

"Sworn before me at the City of
Ottawa, the 2nd March, 1858.

"W. GLEGG, J. P."

The objections taken by the defendants' counsel were as follows : 1st—That there was no oath of the plaintiff declaring the amount of loss, or that the amount of losses sustained was true and just. 2nd—No oath declaring the

value of the subject matter insured. 3rd.—No oath stating how the house was occupied at the time of the fire, nor by whom. 4th.—That the certificate of the justice did not state the value of the subject matters assured, or the amount of the loss, nor that the plaintiff had sustained the loss on the subject matter assured ; but for all that was stated he might have sustained such loss on some other matters, say the loss of the building, if he owned it. 5th.—That the affidavit of the plaintiff and his wife did not state the value of the goods or the amount of loss.

The learned judge was strongly inclined to think that the plaintiff must fail, but preferred taking the opinion of the jury as to the value, and to let the verdict be subject to the opinion of the court. The jury assessed the amount at £141, and the verdict was taken subject to the opinion of the court.

C. S. Patterson, for the plaintiff.

Richards, Q. C., for the defendants, cited *Lambkin v. Western Assurance Co.*, 13 U. C. R., 237 ; *Jacobs v. The Equitable Insurance Co.*, 17 U. C. R. 35 ; *Mason v. Harvey*, 8 Ex. 819 ; *Worsley v. Wood*, 6 T. R. 710 ; *Cinquemars v. The Equitable Insurance Co.*, 15 U. C. R. 143, 246.

ROBINSON, C. J., delivered the judgment of the court.

We are of the opinion which was formed by the learned judge upon the trial, according to his note of the case, that the plaintiff is disabled from recovering for want of complying with the seventh condition of the policy. Neither the affidavit of loss made by the plaintiff, nor the justice's certificate were such as the law required. They were defective in very essential points.

The magistrate's certificate did not state, as it is requisite it should, that the amount of loss mentioned in it had been sustained on the subject or property insured. There may have been no design to evade the necessary statement, but it is quite clear that the certificate in the form in which it stands is altogether unsatisfactory, and falls short of what the condition requires, for it might be all true the magis-

trate states, and yet the plaintiff may not have lost a shilling's worth of the goods *covered by the insurance*. The affidavits and statements of the loss are also framed without any regard to what the conditions of the policy required. It is contended on the part of the plaintiff that the defendants cannot raise objections to them, because they were received and retained, and such objections were not pointed out. However that may be in regard to the statement and proof of the loss, the justice's certificate, such as it is, was not received when the secretary wrote to the plaintiff respecting the other documents. This is an action against a Mutual Insurance Company, established under our statute 6 W. IV., ch. 18. We have examined that act and the acts amending it, and we find nothing in them which it appears to us should prevent the companies formed under it from making such reasonable conditions as they may think necessary in order to guard against frauds.

In our opinion a nonsuit should be entered, or a verdict for the defendants, according to the terms in which the points were reserved.

ELWOOD V. CAMERON.

Practice—Several issues—New trial.

Where defendant has a verdict against him on some issues, and in his favour on others, the court will not on his application grant a new trial on the former only.

ACTION on the common counts for work and labour and materials found. There were two special counts also, on both of which the jury found for the defendant, and their verdict in that respect was not complained of.

To the common counts the defendant pleaded not indebted, set-off, and payment. On these counts the jury found for the plaintiff, £100. The trial took place at Toronto before *Hagarty, J.*

Anderson moved for a new trial on the law and evidence, as regards the causes of action stated in the first count.

McIntyre shewed cause, and objected that the defendant

could not have a new trial in respect of some of the issues, but could only have a new trial generally.

ROBINSON, C. J., delivered the judgment of the court.

We think that, although there are instances of a new trial being granted upon one or more issues, allowing the verdict which has been given on other issues to stand, yet that the court takes that course only in cases where they are in a situation to impose conditions on the party applying for the new trial; as when there has been conflicting evidence, and it is within the discretion of the court to grant or refuse a new trial, on his consenting to let the verdict stand, which has been rendered in favour of the opposite party upon other issues. But here the defendant, who is moving for a new trial upon the first count, has a verdict in his favour upon other counts, and we do not see our way clear in granting him a new trial upon that part of the record only on which he has failed. (a).

The question with us has been, whether, upon the evidence, there was sufficient ground for granting a new trial on account of the verdict given by the jury on the first count. The evidence is certainly inconclusive and contradictory, and we have come to the conclusion that the defendant may have a new trial on payment of costs, but it will not be confined to particular issues, and the defendant may determine rather to let the case rest as it is.

MCVICAR V. ROYCE.

Principal and surety—Money paid.

H. had leased to defendant certain premises, the plaintiff becoming his surety for the rent. Defendant being in arrear the three met, and it was agreed that the lease should be given up, and the plaintiff should secure H. by mortgage for the amount due, and that H. should release defendant. The mortgage was executed, and H. gave a receipt to the plaintiff for the sum secured. Before the mortgage fell due or had been satisfied, the plaintiff sued defendant as for money paid, and the jury found that the mortgage was received in satisfaction of defendant's debt with his assent. *Held*, that the action would lie.

ACTION for money paid for defendant's use. *Plca*—never indebted.

(a) See *Earl of Macclesfield v. Bradley*, 7 M. & W. 570; *Hutchinson qui tam v. Piper*, 4 Taunt. 555.

At the trial, before *Richards, J.*, at Perth, the following facts appeared. On the 10th of November, 1855, one Hubbell executed a lease of a grist mill and premises, situate in the township of Fitzroy, to the defendant, for three years from the 13th of November, 1855, at the rent of £125 a year, payable half-yearly. This lease was given in consideration of the covenants contained in it, and besides the covenant of the defendant the plaintiff joined in the lease as a surety for defendant, and covenanted with Hubbell that the defendant should pay the rent. The defendant got in arrear with the rent, and on the 19th of June, 1858, there was a year's rent due. The defendant, it appeared, wished to give up the mill and premises, but Hubbell would not agree to it unless the defendant would pay, besides the year's rent then due, three months' rent in addition. The plaintiff, defendant, and Hubbell, met together on the 19th of June, 1858, and came to a settlement; Hubbell agreed to receive back the mill and premises, and defendant agreed that he would pay the three months' rent. The defendant not being able to pay the amount, and Hubbell having obtained judgment against both plaintiff and defendant upon the covenant for payment of the rent, it was agreed between the plaintiff and Hubbell, that the plaintiff should secure Hubbell for the amount of rent due and the three months' rent by mortgage, to become due on the 13th of November, 1858. The plaintiff gave Hubbell the mortgage, and Hubbell discharged the defendant entirely, not by deed, but by the parol agreement and arrangement put in writing as follows :

" Mr. Charles Boyce,

To James Hubbell, Dr.

19 June, 1858.—Rent and interest and amount settled upon with him, and giving up possession of leased property £158 18s.

Received the above sum of One Hundred and Fifty-Eight Pounds and Eighteen Shillings from Mr. William McVicar his security.

Hubbell's Falls, June 19, 1858.

(Signed,)

JAMES HUBBELL."

Hubbell surrendered the lease to the plaintiff, and the

defendant delivered up the possession of the premises to Hubbell, and was aware of and assented to the plaintiff securing Hubbell by his giving him the mortgage.

This suit was commenced by the plaintiff on the 22nd of June, 1858.

At the trial the defendant contended, that as the plaintiff had not yet paid the amount, and in fact the mortgage was not then due, this action could not be maintained.

The learned judge left it to the jury to say whether, as a matter of fact, the mortgage was received by Hubbell in satisfaction of his demand against the defendant, and whether defendant was an assenting party to such arrangement and gave up the leased premises on those terms. The jury found for the plaintiff, and the learned judge reserved leave to the defendant to move the court to enter a nonsuit if those facts would not entitle the plaintiff to recover.

Phillpotts obtained a rule *nisi* according to the leave reserved.

Richards, Q. C., shewed cause, and cited *Cannan v. Wood*, 2 M. & W. 465 ; *Hooper v. Stephens*, 4 A. & E. 71 ; *Hart v. Nash*, 2 Cr. M. & R. 337 ; *Barclay v. Gooch*, 2 Esp. 571 ; *Rodgers v. Maw*, 15 M. & W. 444 ; *Howard v. Danbury*, 2 C. B. 803.

Prince supported the rule, citing *Maxwell v. Jameson*, 2 B. & Al. 51 ; *Taylor v. Higgins*, 3 East 169 ; *Lees v. Westley*, 11 U. C. R. 322.

ROBINSON, C. J.—Here the defendant was a party to the arrangement between his landlord, Hubbell, and the plaintiff, by which he was discharged and a receipt given to him in full, and it was positively proved that Mr. Hubbell received the plaintiff's mortgage for the debt in satisfaction of the indebtedness.

I think, under such circumstances, the plaintiff having assumed the debt, and settled it so far as the defendant is concerned, can look to him for payment, and could do so even if Mr. Hubbell should forgive him the debt.

The case of *Rodgers v. Maw* (15 M. & W. 444), shews the

plaintiff entitled to recover in this case, for Royce was discharged from the debt by Hubbell. The mortgage of the plaintiff was truly taken by Hubbell in discharge of *his* debt, and that entitles the plaintiff to recover in this form of action ; and I do not think that the circumstance of the plaintiff's mortgage not being yet due when this action was brought makes any difference, for that was mere matter of arrangement between him and Hubbell. It was the making this conveyance of his land to Hubbell that by consent of all the three satisfied the defendant's debt. They were all parties to the arrangement, which distinguishes this from any of those cases where the original debtor has not been discharged by agreement upon the other assuming the debt. In the case of *Taylor v. Higgins* (3 East 169), there had been no transfer of the debt. The original debtor had not been discharged, as in this case he was, and the same differences existed between *Maxwell v. Jameson* (2 B. & Al. 51), and the present case.

BURNS, J.—The defendant relies upon the cases of *Taylor v. Higgins* (3 East 169), *Maxwell v. Jameson* (2 B & Al. 51), *Power v. Butcher* (10 B. & C. 329), and in our court, *Lees v. Westley* (11 U. C. R. 322), to prove that the plaintiff can not maintain this action until he shall have paid the mortgage security given by him on account of the debt due by the defendant to Hubbell.

This case has the distinguishing feature in it wanting in all those mentioned, namely, that the defendant is a party to the whole arrangement, and the jury have pronounced that Hubbell, as he stated himself, had taken the security from the plaintiff in satisfaction for discharging the defendant from further liability to him. In *Isreal v. Douglas* (1 H. Bl. 241), Lord Loughborough said, "where a party has not the substantial justice of the case on his side, the court will not favour any action he may bring, but where justice is clearly with him they will, if possible, allow him to maintain the action he has brought." It has been held that the delivery of goods amounts, if accepted as cash, to payment, and may be treated as such.—*Cannan v. Wood* (2 M. & W.

465), *Hooper v. Stephens* (4 A. & E. 71.) Here Hubbell agreed to receive and did receive, as far as the defendant was concerned, a mortgage from the plaintiff in payment of defendant's debt, and the defendant in discharge of the debt he owed Hubbell, and now owes the debt to the plaintiff. There is nothing in the argument that the plaintiff may collect the amount from the defendant, perhaps, and yet never pay Hubbell. Though that possibly may be so, yet Hubbell never can resort to the defendant for it, and to this defendant it can make no difference whether, as between the plaintiff and Hubbell, the amount should be lost to Hubbell.

MCLEAN, J., concurred.

Rule discharged.

ROWE V. COTTON.

Deed of dissolution—Construction of—Computation of interest.

In a deed of dissolution of partnership between plaintiff and defendant, it was recited that the plaintiff had agreed to give up all his interest in the assets, on the defendant satisfying all claims, and paying to him £3080, in liquidation of which amount the plaintiff agreed to take certain stock at a valuation, so far as it would go; the balance, after deducting the value of the said stock, to be paid to the plaintiff in equal amounts, at 3, 6, 9, and 12 months, *with interest from the valuation of the said stock*; and defendant covenanted to pay the plaintiff at the expiration, of 3, 6, 9, and 12 months after the valuation, the balance of said £3080, *together with interest*. The valuation was delayed for some time.

Held, that interest could be claimed only from such valuation, not from the date of the deed of dissolution.

ACTION on a covenant to pay money, continued in a deed of dissolution of a partnership which had before existed between plaintiff and defendant.

The deed was dated the 30th of May, 1854. It recited that they had mutually agreed to dissolve partnership, "and that the said Rowe hath agreed to surrender all his interest in and claims to the assets, upon the said Cotton agreeing to assume and satisfy all claims of every description on the firm of Cotton & Rowe, and John Martin & Company, and also upon the said Cotton paying to the said Rowe the sum of £3080, in liquidation of which amount the said Rowe agreed to take, so far as it would go, at a valuation, the stock held in the Whitby Harbour Company, and referred to in the agreement made between the said parties, dated the

5th of April, 1854. The balance, after deducting the value of the said stock, to be paid to the said James Rowe *in equal amounts, at three, six, nine, and twelve months, with interest from the date of the award of the valuation of the stock above named*, which said stock is to be at once assigned by the said Cotton to the said Rowe." And the parties to the deed declared their partnership to be dissolved. Rowe assigned to Cotton all his interest in the partnership stock and effects; and Cotton covenanted to indemnify Rowe against the actions and claims of creditors of the late firm. "And also, that he, the said James Cotton, his executors, administrators, and assigns, shall and will pay, or cause to be paid to the said James Rowe, his executors, &c., at the expiration of three, six, nine, and twelve months after the making of the award or umpirage, respecting the valuation of the said stock, the balance, if any, that may be found due of the said sum of £3080, together with interest."

At the trial, at Toronto, before *Robinson, C. J.*, the plaintiff claimed to have the interest estimated from the date of the dissolution. The defendant contended that it could only be claimed from the time of making the award by which the stock was to be valued. By consent a verdict was taken for £545 os. 10d; being the balance yet unpaid of the £3080, with interest reckoned from the date of the award; and leave was reserved to the court to add £110 8s. 9d. on account of interest, if they should be of opinion that the interest should be carried back to the date of the deed dissolving the partnership.

C. S. Patterson, obtained a rule *nisi* accordingly, to which *Read, Q. C.*, shewed cause.

ROBINSON, C. J. delivered the judgment of the court.

We are to consider that by the terms of the dissolution of partnership Rowe was to give up all his interest in the partnership effects, and assets of every description, and Cotton was to pay all the debts, and to pay to Rowe £3080. We must suppose, consequently, that in the estimation of both parties, what Rowe was surrendering entitled him to receive

£3080 by way of compensation; and as that sum, for all that appears in the writings, was to be paid to him immediately, if interest was to be paid at all it would, according to the natural course of such transactions, have begun to accrue immediately, and so we have no doubt it would have been made to do here, if it were not that Rowe had consented to take the Whitby Harbour Stock on account of the £3080, and to take it at a valuation to be made by a referee. We dare say it was contemplated by the parties that this valuation would be made in a day or two, and why it was delayed for so long a period is not explained. If it had been done at once, then this dispute would never have arisen, but as it is, the difference between making the interest commence at the time of the deed dissolution, or at the time the stock was valued, is a considerable sum.

The common sense of the thing surely is in favor of what the plaintiff contends for. If there had been no writing, and nothing expressly said about interest, it must have seemed right to hold that the £3080 being a debt due by Cotton when the terms of the dissolution were settled, and the delay being merely for his interest and convenience, in order that it might be ascertained what credit he should have on account of the stock, we think any man of business would agree that there could be no just reason why the balance still to be paid by him should not draw interest from the time that it became a debt due to Rowe. But the parties could make just such an agreement as they liked about it, and they did come to an understanding which they expressed in writing, and which was intended to settle from what time interest should be payable by Cotton.

We confess we have thought that, although the recital in the deed of the 30th of May, 1854, does appear to support strongly what the defendant contends for, yet the operative words of the agreement, as regards the payment of interest, admitted without difficulty of a different construction; and if they ought, taken by themselves, to receive such a construction as would better accord with what we may suppose the parties probably intended, then that they ought to prevail

against the language of the recital. We should none of us have any difficulty, we think, in so holding; but it appears to us the language of the covenant does not, in this respect, so clearly demand a different construction from that used in the recital as to make it right for us to hold that the interest is to run from the date of the deed of dissolution. It may easily bear the same construction as the recital, and therefore we have come to the conclusion that we must rather look upon the recital as explaining more clearly what the parties meant.

Our judgment is in favour of the defendant, and the rule is, therefore discharged.

Rule discharged.

BIRD ET AL. V. B. FOLGER, E. FOLGER AND PECK.

Affidavit sworn before British consul—Absconding debtor—Attachment—Confession of judgment—Priority—Fraud.

Quære, whether affidavits sworn before a British consul in the United States can be read in answer to a rule in this court.

Where an absconding debtor's goods have been attached, a creditor obtaining a confession of judgment from him, without service of process, and execution upon it before the attaching creditors, does not obtain priority.

Held, that in the affidavits no case was made out for setting aside the judgment so obtained on the ground of fraud or collusion.

Brooke obtained a rule upon the plaintiffs to shew cause why the judgment signed upon the cognovit in this case, the *fi. fa.*, and all proceedings under it, should not be set aside, and why, if the sheriff had made any money thereon, he should not pay the same to one George Raymond, or into this court, to abide their order, upon the grounds of fraudulent collusion between the plaintiffs and the defendants in obtaining the judgment, in order to prevent the said George Raymond obtaining satisfaction of his judgment against the defendant Peck, in an action of Raymond against him, and to defraud Raymond of his claim against the other defendants.

And upon the grounds that the plaintiffs in this case had, about the 26th of August, 1857, executed (as creditors) an assignment made by these defendants for the benefit of their creditors, and whereby they covenanted with the defendants

not to bring any action against these defendants in respect of the same cause of action for which judgment is entered in this case ; or why such further or other order should not be made as to this court may seem right.

The rule was moved on behalf of Raymond. The three defendants were in business together as lumber merchants, Peck residing at Vienna, in this province, and the two Folgers, father and son, living at Buffalo. The firm at Vienna was Peck & Co., and Buffalo, Folger, Son, and Peck.

Peck & Co., drew a bill on Folger, Son, & Peck, in favour of George Raymond, which was accepted, and on that and other demands the defendant owed Raymond about £70.

Afterwards, on the 26th of August, 1857, Peck & Co. made an assignment of all their estate and effects to Stedman and Nichol, whereby certain persons, including all these plaintiffs except Stanley, were to be paid in full. The plaintiffs all executed the assignment except Stanley, and by it released the defendant from all debts, &c.

All the plaintiffs resided in the United States of America. The defendants had many creditors residing in Canada, none of whom were made preferential creditors.

Peck absconded, and Raymond soon after the assignment sued out an attachment from the County Court of Elgin, against him as an absconding debtor, and obtained a verdict against him for £63, and he afterwards commenced an action against the Folgers on the bill of exchange.

On the 10th of February, 1858, a cognovit was given in this case by all the defendants for £2851, 19s. 4d., and judgment was thereupon entered without delay, and execution issued, and on the 6th of October, 1858, the defendants' goods were advertised to be sold under it. Nichol and Stedman, it was sworn, had acted under the assignment, and had received moneys under it, but that was contradicted by affidavits filed on the other side.

Raymond's attorney swore that he believed the judgment was fraudulent and collusive, for the purpose of defeating the claims of Raymond, and the other creditors, and that the property in Canada seized by the sheriff would not more than satisfy that judgment.

The plaintiffs, it was admitted, had no joint cause of action against the defendants, but by an arrangement among themselves consolidated demands which they severally had against them, and took a confession for the aggregate amount in their joint names.

On the plaintiffs' part, affidavits were filed stating the amount of the debts due by the defendants to the plaintiffs severally: that the defendants having employed Mr. Miller, an attorney at St. Catharines, to collect the debts, he recommended the demands to be consolidated, in order to save the expense of seven confessions of judgment; that this was accordingly done, with the understanding that if the whole sum confessed could not be recovered, the amount recovered should be divided among the plaintiffs in proportion to their respective debts. Affidavits were filed of three of the plaintiffs confirming this statement contained in the affidavit of Benjamin Folger, one of the defendants, and swearing to the justice of their respective demands, and to the amount of each.

Folger further swore that the defendants did make an assignment in August, 1857, as sworn on the part of the plaintiffs, but that it was objected to as insufficient, and both the assignees declined to act under it: that these plaintiffs all executed that deed except Stanley: that several of the creditors in Canada, who would not execute the assignment, sued out attachments against the defendants as absconding debtors: that the sheriff had seized the effects of the defendants in the county of Elgin, under attachments or other process against *him*, and the other defendants, or some of them: that these plaintiffs hearing of this state of things, applied to the defendants for a confession of judgment, fearing they would lose their debts, and that such confession was therefore given on the 10th of February last, (1858): that the whole amount claimed by the plaintiff was justly due to the plaintiffs collectively: that there was no fraudulent collusion or intent in giving the confession, but that it was done in good faith, to pay debts honestly due.

These affidavits were all sworn before the British consul in Buffalo, who signed a proper jurat, and affixed his official

seal. The defendants' counsel objected to their being received.

Richards, Q. C., shewed cause. *Burns* supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

First, can we properly receive affidavits for the purpose of resisting this motion, which were sworn in Buffalo, before the British consul there? We have no statutes here making affidavits so sworn admissible, as they have in England, and it is to be regretted that we have not. In the absence of any statute the authority is not clearly in favour of admitting them. (a)

Then looking at the case which Mr. Raymond has placed before us, it would not at any rate warrant us, we think, in interfering summarily, except in a case coming under the 55th section of the Common Law procedure Act, 1856, which this does not.

The question of fraud or no fraud should be tried, when it can be, by a jury. We cannot summarily determine that the defendants did not owe the debt for which the judgment is recovered, unless in a case coming under the 55th clause of the Common Law Procedure Act, 1856. And as to the release contained in the assignment, we could not dispose of the rights of parties in a summary manner on such a ground. It is very capable of explanation. It was, as we must suppose, given in connexion with the assignment, and if that fell through by reason of the assignees not accepting the trust, the creditors who had released should not be bound by their release.

The judgment was confessed in favour of the plaintiffs after the other creditors in Canada had sued out attachments. The question is not raised by this application whether, under the circumstances stated, the effects seized in this province under the attachments should be divided among all the attaching creditors, or whether the plaintiffs have gained priority. If it were, it might be material to have some facts more precisely stated. At present we take it, when

(a) See *Tetley et al. v. Knowlson, et al.*, 2 P. R., 275.

goods have been taken into the custody of the law under attachments, and the attaching creditors have with due diligence proceeded to judgment and execution, the proceeds of the debtor's goods must, under the 57th clause of the Common Law Procedure Act, 1856, be divided rateably among the attaching creditors, unless there is a creditor who, *by having served his process personally on the debtor before any attachment was sued out*, and having also obtained execution first, shall under the 55th clause be entitled to priority over all the attachments.

We do not think that Mr. Raymond, the attaching creditor has made out any ground for our setting aside the execution or judgment which the plaintiffs have obtained; but we consider that the plaintiffs have not obtained priority by reason of taking their cognovit from the absconding debtor in a foreign country, and obtaining judgment thereon and execution before any attaching creditor, because not having commenced their action by process served on the debtor, they do not come under the 55th clause of the act, and the 57th clause, is consequently left to its operation, without anything to interfere with a distribution among the attaching creditors. (a)

Rule discharged, but not with costs.

THE MUNICIPAL CORPORATION OF VESPRE AND SUNNIDALE V. BEATTY.

O. S. & H. R. R. Co.—12 Vic., ch. 196, sec. 35—*Refusal to register transfer of stock—Mandamus.*

Held, that under 12 Vic., ch. 196, sec. 35, the clerk of the Ontario, Simcoe and Huron Railway Co., could not refuse to register a transfer of stock from one municipal corporation to another on the ground that no by-law had been passed sanctioning such transfer.

Where any reason is given for the refusal complained of it should be stated in the application for a mandamus.

Jackson obtained a rule *nisi*, calling on Mr. Beatty, the clerk and secretary of the Northern Railway of Canada, to shew cause why a mandamus should not issue, commanding him to receive and file the duplicate of a deed of bargain and sale, dated the 20th of November, 1857, purporting to convey to these applicants 600 shares of the stock of the said

(a) See *Daniel v. Fitzell et al.*, ante, page 369.

Northern Railway, and to make an entry of such sale in his books, pursuant to the statute 12 Vic., ch. 196, sec. 35; and why the defendaut should not pay the costs of this application.

A deed was produced, dated the 20th of November, 1857, sealed with the corporate seal of the county of Simcoe, and the corporate seal of the United Townships of Vespra and Sunnidale, and signed by the warden of the county and the reeve and clerk of the united townships, by which deed the county of Simcoe, in consideration of £1 11s. 3d., sold and transferred to the municipality of the United Townships of Vespra and Sunnidale, six hundred shares of the stock of the railway company, called in the deed the Ontario, Simcoe, and Huron Railroad Union Company. And in the deed it was stated that the vendees thereby agreed to accept the shares.

An affidavit was made (on the 25th November, 1858), by M. B. Jackson, Esq., that he did, on the 20th of November, 1858, on behalf of Vespra and Sunnidale, deliver to Beatty, secretary of the Northern railway, a true duplicate of the deed, to be filed and kept, and required him to make an entry thereof in his books; that he tendered Beatty 1s. 3d. for his fees; that Beatty admitted that he was the proper officer to file and enter transfers of stock, but refused to file, or keep, or enter the transfer so shewn to him, or to accept the fee, and refused to recognise or to carry out in any way whatever the said transfer. The affidavit did not state whether Beatty did or did not give any reason for his refusal. Nothing further was shewn than the deed and the affidavit mentioned.

Cameron, Q. C., shewed cause, and objected that it ought to appear that a by-law had been passed sanctioning the transfer. *Richards, Q. C.*, supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

It would have been more satisfactory if the affidavits in support of this application had stated what reason the clerk assigned for not receiving and entering the transfer, or

that he had given no reason. It is seldom that any person and especially a public officer, simply refuses to do a particular thing required of him, without stating why he refuses; and when a reason is given, it ought to be stated by the party who applies to the court in consequence of such refusal, for if stated, it might appear at once to the court that the mandamus ought not to go. However, the defendant has had fair opportunity for stating his reason to the court, and in practice the courts do not in general insist on the applicant setting forth the reasons which were given to him for the refusal.

On the return of the rule, all that has been objected is, that there is no by-law shewn to have been passed by either municipality authorising the transfer of the stock. But we do not think the clerk can set up that as a reason for his not complying with what the 35th section of the act 12 Vic., ch. 196, makes it his duty to do. His business is to register the transfers which are brought to him, if properly made out by deeds produced. He is not to enquire whether a by-law had been passed. The transfer would not, as a matter of course, be valid merely because the secretary entered it. It would depend upon circumstances with which he has nothing to do, and any body is at liberty to dispute the validity of the transfer notwithstanding it may be entered in the company's books.

The business of the officer is to register transfers brought to him, in compliance with the statute, leaving it to those concerned to contest the validity of the deed produced.

We make the rule absolute, but not with costs.

Rule absolute.

IN THE MATTER OF THE CANADA TRADE ASSOCIATION.

Crown office—Right to search for judgments.

A person is entitled to search at the Crown Office for judgments against any number of persons named, and the clerk of the Crown should allow him to make such search, if a long one, at whatever time is most convenient with respect to the other business of the office.

He is not entitled to search the judgments entered during a particular period, without reference to any named parties.

Harrison made an application for the direction of the

court to the clerk of the Crown and Pleas to allow a person to inspect the docket books and other books of the court containing entries of judgments for the month of December last, or to furnish the information for the said month, upon payment of the usual fees. It was alleged upon affidavit that the clerk had declined to allow the searches to be made, or to furnish such general information. The court directed Mr. Harrison to give the clerk of the Crown notice for some particular day of his intended application, in order that the clerk of the Crown might be heard by counsel if he desired it.

Such notice was given and the clerk of the Crown informed the court that he had no objection to allow the searches to be made if the court considered that any person had a right to make a demand for such general information.

Eccles, Q. C., and Harrison, in support of the application, cited *Fleming v. Newton*, 1 H. L. Cas. 363.

BURNS, J., delivered the judgment of the court.

The avowed object of seeking this information is, that if it be obtained the parties intend to publish it, as they say, for the mutual protection of the members of the association. At present we have nothing to do with any question how far parties may or may not render themselves liable to any individual for making known to the world the extent of liability which the records in the office may shew. No doubt the judgment books in the Crown office are to be allowed to be inspected by any one who pays the proper fees for the purpose, and the only question is, whether a wholesale or general search such as contemplated be allowable. We do not see upon what principle we can deny a person the right to make 500 searches continuously, any more than he could be denied five, or even one, if he asked to do so and offered the fees. It is not for the clerk of the Crown to enquire the purpose for which the information is required; these books are public property, and required for the express purpose of affording public and general information.

In stating this it must be understood that the clerk of the Crown has also a right, in order to carry on the public

business of the offices, to have the use of the books, and persons have also a right to make searches in those books, and the regular business of the office must have precedence over that which appears to be for the purpose of private information not connected with the regular business. No person would be justified in claiming a right to be continually making searches, so that the regular business of the office would be interrupted or suspended. As to the time when such general information may or can be afforded without such interruption the clerk of the Crown must judge. The internal œconomy of his office, so that the public business is efficiently carried on, is a matter for his consideration, and of course the court will give no direction in the matter, or interfere with him, unless an application be made by some of the litigating parties or persons interested in some matters of which any one has a right to complain, and of which the court will take cognizance.

Subject to this duty, which we conceive is the first duty which the clerk of the Crown owes the public in the performance of the business of his office, we do not see that he can properly refuse the duty of giving or allowing such information as the public records offer, upon being paid the proper fees. This should be governed by another principle also, which is this: if a person asks for a general search of the books for a particular month, without naming any individual or individuals, we apprehend the clerk of the Crown may properly refuse to have his time, and that of his clerks taken up with giving that information. He may give the information if he pleases, but we think we should not hold him bound to do so. If the search be desired in respect of A. B. or C. D., or E. F., or 500 persons, we apprehend the clerk of the Crown could not legally refuse to permit the searches to be made.

We think that we are not called upon to make any order in the matter as it stands now.

REGINA V. WELLS.

County Court—Omission in recital of appeal bond—Re-execution—Refusal to certify papers for appeal—Mandamus—Demurrer to return.

The defendants in a suit in the county court gave notice of an appeal from the judgment there, and on the 18th of January an order was made by the judge staying proceedings for four days, to allow them to give bonds for appeal, and directing the bond to be taken in \$600. On the 19th the bond was filed, the proper penalty being inserted in the obligation, but before the condition there was a recital of the judge's order in which this same sum was left blank. The judge observing this omission in the bond filed pointed it out to the defendant's attorney, who inserted the sum, but the judge afterwards required him to get the bond re-acknowledged, and he procured it from the clerk of the court for that purpose. The plaintiff's attorney called to inspect it, and finding it gone gave notice of taxation; but it was returned before judgment entered, and notice given to the plaintiff's attorney that the judgment if entered would be moved against. Judgment was nevertheless entered, and a summons obtained to set it aside was discharged, on the ground that the bond when first filed was defective, and that it had not been refiled with an affidavit of execution after being corrected. The judge afterwards refused to transmit the papers for appeal, and a mandamus *nisi* having been obtained, returned the above facts. The defendant demurred to the return, and moved to quash it.

- Held*, 1. That in this country there can be no demurrer to a return, the statute allowing it in England, 6 & 7 Vic., ch. 67, not being in force here.
2. That the return was insufficient and must be quashed, for that the bond was sufficient when first filed, the omission being immaterial: that the sum might have been inserted without re-execution, and that it was therefore unnecessary to file any new affidavit.

A suit was tried before the county court in the county of Kent, wherein Charles Stewart was plaintiff, and Robert Wilson, James Wilson, and James Gray were defendants, in which a verdict was rendered for the plaintiff. The defendant's counsel made certain legal objections at the trial to the plaintiff's right to recover, as appeared by the papers filed, and leave was reserved to move in term on the points raised at the trial. An application was subsequently made to the court in term, and a rule was obtained to shew cause why the verdict for the plaintiff should not be set aside, and either a judgment of nonsuit or judgment for defendants entered *non obstante veredicto* upon points reserved at the trial, which were set forth in the rule. That rule was discharged, and the defendants' counsel not acquiescing in the judgment gave notice of appeal to the Court of Queen's Bench, and on the 18th of January, 1859, an order was made by the judge directing that all proceedings in the cause should be stayed for four days, to allow the defendants

to give bonds for appeal under the statute from the judgment delivered in the said suit on the 17th day of January: the said bond to be taken in the sum of six hundred dollars.

On the 19th of January a bond executed by the defendants and two sureties in the penalty of six hundred dollars, together with an affidavit of justification by the sureties, was filed in the office of the clerk of the county court, conditioned that if in the event of the said appeal being given against the said defendants by the Court of Queen's Bench, the defendants should abide by such decision so to be made in the said cause, and should well and truly pay all sums of money and costs, as well as of the said suit of the said appeal, as should be taxed and awarded to the said Charles Stewart, then the said obligations to be null and void.

There was a recital before the condition, setting forth that upon notice of appeal Wm. Benjamin Wells, Esq., judge of the county court, had ordered that the defendants should give a bond to the plaintiff with two sureties in the sum of ———, conditioned as thereafter mentioned, in pursuance of the statute in that behalf made and provided, and when the bond was filed the blank was not filled up with the sum intended to be inserted in it. The judge, as appeared by his return to the *mandamus nisi*, casually seeing the bond in the clerk's office, and observing the blank not filled up, "intimated to the defendants' attorney that the omission in the filling up of the blank would probably be objected to when he should take the bond into consideration," and the defendants' attorney then, considering the insertion of the sum of six hundred dollars as not in any way essential, or affecting the validity of the bond, filled up the blank with that sum.

The bond was filed on the 19th of January, and Mr. McCrea, the defendants' attorney, stated in his affidavit that it was about the 24th of January his attention was called by the judge to the blank in the recital. He further stated, that soon after he had filled up the blank he was informed by Mr. Ireland, clerk of the court, that the judge required the bond to be re-acknowledged by the parties to it; that in consequence he sent his clerk to the office to get

the bond temporarily for the purpose of having the obligors re-acknowledge the execution, the clerk being the subscribing witness, and the judge on being informed of what had been done approved of it. While the bond was withdrawn for the purpose of re-acknowledgment the plaintiff's attorney swore that he called at the clerk's office for the purpose of inspecting it, and that being informed that it had been so withdrawn, he immediately gave defendants' attorney notice of taxation of costs with a view to enter judgment. The bond was returned in the office before the judgment was entered, and the defendants' attorney gave notice to Mr. Woods, the plaintiff's attorney, that he would move against the judgment if it should be entered. The judgment was nevertheless entered, and the defendants' attorney obtained a summons to shew cause why the judgment signed on the 28th of January should not be set aside, or why all subsequent proceedings thereon should not be stayed, on the ground of an appeal having been made to the Court of Queen's Bench against the judgment of the county court judge, given on the 17th day of January, and on other grounds stated. That summons was discharged, as appeared by the statement endorsed on it by the judge, on the ground that the statute had not been complied with: that the bond for appeal was defective: that it was not properly filed: that no proper affidavit of execution of the bond was filed after what was added to it (by filling up the blank in the recital); and that the bond had not been re-filed after it was executed.

Read, Q. C., for defendants, obtained a *mandamus nisi*, calling upon the judge to certify to this court the pleadings, and all motions, rules and orders, that had been made, granted, or refused in the cause between the said parties, together with his own charge, judgment or decision therein, and the evidence and all objections and exceptions thereto on the trial of the cause, in pursuance of the appeal lodged therein on the part of defendants, pursuant to the statute in that behalf made and provided.

To this *mandamus* the judge returned that the cause was tried on the 15th day of December, 1858, and a verdict ren-

dered for the plaintiff for \$314 95. That at the January term ensuing a motion was made for a new trial, which was refused after argument. That on the 18th of January, at the request of defendants' attorney, an order was made to stay proceedings for four days, according to the statute, to allow time to defendants to give bonds for appeal. That he, the judge, casually saw in the clerk's office a bond purporting to be for appeal, signed by the defendants and two sureties within the four days, and before the time for filing the bond had expired: that finding an omission in filling up the recital of the bond, he intimated to the defendants' attorney that the omission would probably be objected to when the bond was taken into consideration: that judgment was entered up in the cause of the plaintiff's attorney on the 28th day of January: that on the 1st day of February a summons was granted, calling on the plaintiff to shew cause why the said judgment should not be set aside on the grounds stated therein: that after argument that summons was discharged, on the grounds that the bond for appeal was defective in not having been properly filed: that if it were properly filed no proper affidavit of execution was added to it, and that there had been no re-filing of the bond since its re-execution: that this decision was made on the 3rd day of February: that notice from defendants' attorney calling upon him as judge to transmit papers for appeal, which appeared to have been filed on the 25th day of January, was not served until the 1st day of February: that another notice to the same effect had been since served, to which he replied that he was ready to transmit the papers whenever his decision that the bond for appeal was not properly filed according to the statute was overruled.

Read, Q. C., obtained a rule *nisi* to quash the return as defective in form and substance, and too uncertain to be answered, and not shewing sufficient matter in law why the judge should not have transmitted the papers in the writ of mandamus referred to.

A demurrer was also filed to the return, on the grounds: 1st. That it did not shew any sufficient grounds for the judge of the county court refusing to certify or transmit the papers and proceedings referred to in the writ.

2nd. That a sufficient bond of appeal, with sufficient affidavits of justification in the cause, were filed in the proper office within the time for which the judge had granted a stay of proceedings to admit of said bond being filed.

3rd. That a proper affidavit of execution of the appeal bond having been filed before the judge was required to certify the proceedings, he should have certified the same to this court, even though the same had not been filed within the four days for which an order had been granted to stay proceedings.

4th. That the judge should have certified the proceedings when required to do so, even though the bond of appeal, with the affidavits of execution and of justification, were not filed in the proper office till after the four days for which there was a stay of proceedings had expired, so long as they were filed, as they were, before he was required to certify the proceedings.

The rule for quashing the return and the argument of the demurrer came on by arrangement at the same time.

Hector Cameron, on the argument, objected that the proceeding by demurrer to the return could not be supported: that the act 6 & 7 Vic., ch. 67, authorising such a proceeding in England, was not in force in this province: that upon a motion to quash a return to a mandamus the court will not quash it unless it is ridiculous or irrelevant, and that the return in this case was not so; and that the proper course was to bring the return before the court for argument on a concilium, which course was not the one taken in this instance. He cited *Tapping on Mandamus*, 375, 473, 377, 9 Anne, ch. 20; *Gude's Cr. Prac.* 185; *Kingsmill v. Weller*, 16 U. C. R. 479.

Read, Q. C., contended that it was competent for him to proceed by motion to quash the return or by demurrer, and that it was insufficient. He cited 8 Vic., ch. 13, sec. 57; 12 Vic., ch. 66, sec. 11; *Tapping on Mandamus*, 394-5; *Rex v. Evans*, 1 Shower, 259; *Rex v. Mayor of York*, 5 T. R. 74; *Rex v. St. Katharine's Dock Co.*, 4 B. & Ad. 360; *Regina v. Payn*, 11 A. & E. 955; *Rex v. Birmingham, &c., R. W. Co.*, 14 Jur. 899; *Rex v. Lord of the Manor of*

Oundle, 1 A. & E. 299; Regina v. Eastern Counties R. W. Co., 10 A. & E. 558; Kex v. Mayor of Cambridge, 2 T. R. 460.

MCLEAN, J.—The statute of 9 Ann, ch. 20, provides that on return to a mandamus the person prosecuting it may *plead* to or *traverse* all or any *material facts contained in the return*, to which the persons making the return may reply, take issue or demur, and such further proceedings shall be as if an action on the case had been brought for a false return.

This does not authorise a *demurrer* to the *return* if *insufficient*, and I apprehend that in such case the person prosecuting the mandamus is driven to an application to the court to quash it if it be irrelevant, or such as no issue can be taken on, or if matters of law are involved the return may be brought on for argument on a concilium. If indeed the proceeding could be entertained by demurrer, I do not see that the grounds stated could be supported. They consist of allegations of matters of fact and statements of law tending to shew that under the facts as disclosed it was the duty of the judge to have transmitted the proceedings and papers required by the writ. The grounds, I think, are quite correct in themselves, but they cannot be set forth as they are in answer to or as objections to the return.

It appears to me that the return does not shew any sufficient ground why the writ should not be complied with.

A notice of appeal was given, and the judge ordered a stay of proceedings for four days, in order to admit of a bond being filed as required by the statute, and the sum of \$600 was stated as the sum in which the bond should be given. Such bond, with two sureties, who justified, was duly filed within the four days, and the omission of the sum in one of the recitals was wholly unimportant, and could not affect the validity of the bond. Had the recital been wholly omitted the bond would still be valid and sufficient, and the filling up of the blank by the defendants' attorney could neither add to nor diminish its force, nor affect it in any way.

That bond, in order to remove every objection, was taken

out of the office to be re-acknowledged, though it was wholly unnecessary that it should be so, but the judge having intimated through the clerk that it was necessary, it was done to remove any objection on his part. After being re-acknowledged it was again lodged in the office, but not *refiled*. Being perfect when filed in the first instance, it did not require any further filing. It was in the office when the judgment was entered, and the judge had been duly served with a notice calling on him to forward the papers, &c., for the purpose of appeal, with which he declined to comply till his objections to the bond were overruled. These objections not being such as can be sustained, there is no sufficient excuse shewn for not complying with the exigency of the writ, and as the return contains no material facts which can be traversed, I think the return must be quashed, and that a peremptory mandamus should issue for enforcing the transmission of the necessary documents for appeal.

BURNS, J.—The objection taken, that this case cannot be presented in the shape of a demurrer for the consideration of the court, is a good one. The statute of 9 Anne, ch. 20, merely permits a prosecutor to plead to, or traverse a return, yet, singular enough, it allows the defendant to take issue, or demur to the plea or traverse. It seems that it was this distinction which gave rise to the practice adopted of moving to quash the return, or setting down the case upon the return to be argued as a concilium. If the court thought the matter involved a question of law, the practice was not to dispose of it upon the summary application to quash the return, though the court had power to do so, but they directed that it should come on in the shape of a concilium for the purpose of having a more deliberate and formal judgment. The hearing of the matter upon concilium had, so far as the court itself was concerned, all the effect of a hearing upon demurrer, which a hearing upon a rule *nisi* had not. See the *King v. The Mayor of Cambridge* (2 T. R. 460, 461), *The King v. St. Katharine's Dock Company* 4 B. & Ad. 360, *Rex v. The Manor of Oundle* (1 A. & E. 297), *The Queen v. Payn* (11 A. & E. 955), *Regina v. The Birmingham*

R. W. Co. (2 Q. B. 47). Various other cases besides these shew the practice to have been so. Neither of these courses, however, enabled the prosecutor to have the matter upon record, so that if he desired to take the opinion of a Court of Error, he could do so. It was to remedy this inconvenience, as writs of mandamus had of late years so very much increased, that the statute 6 & 7 Vic., ch. 67, regulating the practice, was passed in England. We have no corresponding legislation as yet upon the subject in this country, and therefore we must adopt the practice prevailing upon the statute of Anne.

Then with respect to the question upon the rule, to quash the return to the writ as being an insufficient return. The first statute regulating the appeal from the County Court is 8 Vic., ch. 13, sec. 57. The bond to be given is to be produced to the judge, together with an affidavit of justification of the sureties, and an affidavit of the due execution of the bond, the judge having first named the sum in which such bond shall be given. No time whatever is stated within which this shall be done, but when it is done it is to be produced to the judge at the time of the person making application, that the judge shall certify under his hand the pleadings, &c., to the superior court. The bond with the affidavits mentioned are to remain with the clerk of the County Court until the opinion of the superior court shall be known. The only thing said about limitation of time is that the appeal must be set down in the superior court for argument in the next term after being disposed of in the County Court, and this would imply that all the preliminary matters in the County Court must be completed within that time, otherwise there could be no appeal. The statute 12 Vic., ch. 66, sec. 11, provides that the judge of the County Court shall, at the request of the party intending to appeal, stay the proceedings for any time not exceeding four days, so as to afford the party appealing time to execute and perfect the bond required by the former act. The order was made by the judge on the 18th of January, that the proceedings should be stayed for four days from the 17th, the day judgment was pronounced, to enable the defendants in the suit to perfect

the bond of appeal, and the judge directed that the bond should be taken in the sum of \$600. The bond appears to have been executed on the 18th of January, but there was an omission in it in reciting the judge's order; that is, there was a blank left for inserting the amount the judge had ordered the bond to be taken for, though the penalty was right, and in accordance with the amount ordered. The bail also justified on the 18th of January, and an affidavit of the execution of the bond was attached, and all were left with the clerk of the court within the four days. The judge says that within the four days he casually saw the bond in the clerk's office, and noticing the omission or blank not filled up, he mentioned the circumstance to the defendants' attorney, and that probably the other side would take an objection to it when it came to be considered. The defendants' attorney filed a notice on the 25th January, requiring the judge to transmit the papers to this court, but the judge says he did not receive this notice until the 12th of February. This point does not seem to be material, for the notice to the judge, and the transmission of the papers, may be, we apprehend, at any time which will enable the appeal to be set down at the next term. And if it was apprehended that a delay might take place in requiring the judge to certify the papers in time for the arrangement to take place during the same term, we think it would be competent for the opposite party, if the security be completed within the time prescribed by the judge's order for delay, to give the judge the notice to certify the papers and proceedings, in order that the appeal might be heard at the next term.

After the defendants' attorney was notified of the blank existing in the recital of the judge's order in the bond, he obtained the bond from the clerk's office for the purpose of having that blank filled up and re-acknowledged. This was done on the 24th of January, after the expiration of the four days' order to stay the plaintiff, and the bond was returned to the clerk's office without any other or further affidavit of execution. The plaintiff treated this as no compliance with the statute and judge's order, and as if no appeal had been properly instituted, and he signed judgment. It is admitted

that before the judgment was signed, the plaintiff's attorney knew what had been done, and how it was done by the defendant's attorney. The judge of the County Court considered, on the application made to him, that under the circumstances the bond had not been properly filed, and that if it were so filed, yet, as there was no affidavit of due execution after the blank had been filled up, the statute had not been complied with, and now upon this writ of mandamus these facts shew that there being no proper appeal, there is no reason that he should certify the papers and proceedings.

We think that the learned judge was in error in supposing that the blank in the recital of the order would avoid the bond. There was no necessity for inserting the sum at all. The bond was in the penal sum which the judge had named, and the insertion of the sum a second time was immaterial. If that blank had been filled up by any stranger, without the consent or knowledge of any of the parties, the bond would not have been affected by it. The case of *Waugh v. Bussell* (5 Taunt. 707), was an action upon a bond for the payment of £100 by instalments of certain amounts until the full sum of *one pounds* was paid up. The person who drew the bond omitted the word *hundred* in this second place, and he afterwards inserted it without the knowledge of the obligor. It was contended this was a material alteration, and without the addition of that word "hundred," the condition of the bond was insensible; but it was held that the bond could be read sensibly enough without that word, and therefore the addition made after the execution of the bond was immaterial. *Byron v. Thompson* (11 A. & E. 31.)

The judge might very well have said nothing about the blank not having been filled up, for the bond would have been perfectly good as it was; but it appears he did so, and he seems to have thought the want of it being filled up would have been fatal, and the defendants' attorney giving way to it, sent the bond to be re-acknowledged, and this was done, all the obligors assenting to the blank being filled up. Now this was done after the expiration of the four days, and the question is, whether this act destroyed the effect of the appeal, and allowed the plaintiff to take his judgment. The

bond was returned again to the clerk of the County Court, and the plaintiff's attorney was aware of all the circumstances. I am of opinion the defendants' right of appeal was not lost in consequence of what was done. The bond was a valid and sufficient one at law in the first instance, but the parties, at the suggestion of the judge, thought they would make it still more so by filling up the blank which had been left. The judge should, I think, have considered it in that light, and have treated the case as if the appeal had been valid, and his order complied with. The judge seems to have thought there was a necessity for a fresh affidavit of the subscribing witness, who inserted the amount in the blank, with the assent of the parties after that act was done. I do not think that was necessary. It was an immaterial addition made to the bond, and therefore not in strictness a fresh execution and delivery of it, requiring fresh proof of execution.

We think the return of the judge to the writ of mandamus an insufficient return, and that it should be quashed, and a peremptory mandamus ordered.

Rule absolute to quash the return. (a)

REGINA V. HARMER.

Recognizance to keep the peace—Proof of breach—What amounts to an assault—Conviction by magistrates—4 & 5 Vic., ch. 27.

Sci. fa. upon a recognizance to keep the peace and be of good behaviour towards Her Majesty and all her liege subjects, and especially towards H. M., charging an assault and breach of the peace. For the Crown a judgment of the Court of Quarter Sessions was proved, affirming a conviction of defendant before magistrates on a charge of assaulting H. M. "by using insulting and abusive language to him in his own office, and on the public street, and by using his fist in a threatening and menacing manner to the face and head of the said H. M."

Held, sufficient proof of a breach of the peace.

Held, also, that defendant was properly convicted, for the offence charged amounted to an assault.

Held, also, on demurrer, (page 558) that the conviction and payment of the fine formed no bar to this proceeding on the recognizance.

On the 23rd of July, 1858, the defendant entered into a recognizance (with sureties) in £50, with condition to be void "if he should keep the peace, and be of good behaviour

(a) The Chief Justice having been absent during the argument, gave no judgment.

towards Her Majesty and all her liege subjects, and especially towards Henry Muma, of the township of Blenheim, for the term of one year."

Sci. fa. was afterwards brought upon this recognizance, in which it was averred "that on the 4th of August, 1858, the defendant Harmer did, at, &c.," commit an assault on the said Henry Muma, and also did make use of violent and threatening language towards the said Henry Muma, and on several other occasions, and several other days, since the said 4th of August, did break the peace, and behaved himself towards the said H. M. in a violent, abusive, and turbulent manner, against the force, form and effect of the said recognizance."

The defendant pleaded, that he did not make an assault upon the said H.M., nor did he in any way break the peace towards the said H. M., as is alleged, &c.

Upon the trial at Toronto, before *McLean*, J., there was produced an exemplification of a record of the Court of General Quarter Sessions of the Peace, of the county of Oxford, of a trial and judgment, on appeal to that court from a conviction which had been made by three justices, on the 21st of August, 1858, of the said Henry Harmer, upon a charge that "he did, on the 4th of August aforesaid, assault Henry Muma, of, &c., by using insulting and abusive language to him in his own office, and in the public street, and by using his fist in a threatening and menacing manner to the face and head of the said Henry Muma." And it appeared by the record, certified from the quarter sessions, that in consequence of the appeal from the said conviction Harmer was tried in that court by a jury, on the 14th of September, 1858, and was found guilty of the said assault, whereupon the said conviction was affirmed.

It was objected by the defendant's counsel, on the trial of the issue joined in the action upon the recognizance, that the record produced from the Quarter Sessions did not shew a breach of the peace towards Henry Muma; and, secondly, another objection was taken, which comes up more properly upon a demurrer to a second plea filed to the *sci. fa.*—namely, that under the statute 4 & 5 Vic., ch. 27, secs. 27

& 28, the defendant having been summarily convicted before justices of the peace, and paid the fine imposed upon him, and the costs, was thereby discharged from any other proceeding, civil or criminal, for the same cause.

Leave was reserved to the defendant to move to have a verdict entered in his favour on these objections, and a verdict was taken for the Crown for £50.

C. S. Patterson obtained a rule *nisi* to enter a verdict for the defendant, pursuant to leave reserved.

R. A. Harrison shewed cause, and cited *Stephens v. Myers*, 4 C. & P. 349.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that we cannot direct a verdict to be entered for the defendant.

The *sci. fa.* charges that the defendant broke the peace by assaulting Muma, and also that he did not observe the condition to be of good behaviour, which is a more comprehensive engagement than the other.

The defendant pleaded in answer, that he did not assault Muma, and did not break the peace; taking no notice of that charge against him by which, if proved, the recognizance would equally have been forfeited: namely, *the not being of good behaviour*.

This plea was therefore not a good bar. Still the Crown has taken issue upon what is pleaded, and we must determine upon this rule whether the verdict should be for the Crown or for the defendant, upon the issue joined, and the evidence given at the trial. It was unquestionably proved on the part of the Crown that the defendant did, after entering into the recognizance, break the peace towards Muma, for he has been convicted by a jury of using threatening language to Muma in his presence, accompanying it by threatening gestures, all which tended to a breach of the peace, and was also a breach of the condition to be of good behaviour. The case of *Stamp v. Hyde* (2 Rolle's Rep. 199) makes that point clear. We refer also to Bacon's Abridgment, "Surety of the good behaviour," B. We think, too, that the case of *Stephens v. Myers* (4 C. & P. 350) does

establish that he was properly convicted before the court of quarter sessions of committing an assault upon Muma, for the using his fist in a threatening manner to his head and face, amounts to an assault, though it is rather clumsily stated.

Rule discharged.

The defendant, in a second plea, set up as a defence, that on the 19th of August he was summarily convicted before a justice of the peace, upon a complaint made by the said Henry Muma against him, for the said assault in the said writ of *scire facias* mentioned, under the statute 4 & 5 Vic., ch. 27, and was adjudged to pay a fine of, &c., and costs, and that he did, before the issuing of the writ of *scire facias*, pay the whole amount adjudged to be paid; and he alleged, that by reason of such complaint, and by force of the said statute, he was released from all further and other proceeding, civil or criminal, for the same cause, and that the *scire facias* was afterwards issued for the same cause for which the complaint was preferred and the conviction had, and no other. This plea was demurred to.

C. S. Patterson, for the demurrer, cited Regina v. Robinson, 12 A. & E. 672.

R. A. Harrison, contra.

ROBINSON, C. J., delivered the judgment of the court.

The defendant relies upon the 28th clause of the 4 & 5 Vic., ch. 27, as protecting him from "all further proceedings, civil or criminal, for the same cause," and consequently as barring this proceeding to enforce the recognizance.

No authority has been cited for giving that effect to the clause referred to, and we are of opinion that we cannot so apply it. A conviction of an assault upon Muma on a certain day is not co-extensive with all that is charged upon him in the *scire facias* as having been committed by him in breach of his recognizance, and therefore on that ground alone the defendant could not protect himself against all that is charged by shewing a summary conviction and pun-

ishment for a single assault alone. But besides that, we are of opinion that the 28th clause, on which the defendant relies, only relieves the defendant, in consequence of the summary conviction and punishment, from being afterwards convicted and punished in any proceeding civil or criminal for the same offence ; in other words, for “ the same cause.” If he had never been proceeded against summarily, but had been indicted at common law, and convicted at the assizes, he could never have been again punished by any criminal proceeding for the same cause. The principles of the common law would have protected him against that, though he would have been liable to a civil action for damages, which that clause would now prevent by reason of his having been summarily punished at Muma’s instance. But the proceeding to enforce the recognizance is one over which Muma had no control ; he could not compromise it by invoking the proceeding before a magistrate. It is not a further or other proceeding for the same cause. It is only following out the breach of the recognizance, which is proved by the conviction, to its legitimate consequence. The words, “ for the same cause,” mean for the same cause only—that is, *for assaulting Muma*—whereas this proceeding is for violating an express undertaking of record into which the defendant had entered for the security of the public peace, of which his conviction may or may not be used as a means of proof.

Judgment for the Crown upon demurrer.

LANGTON V. BACON.

Lessee’s goods sold for taxes left on premises—Liability to seizure for rent.

C. owned a boiler and smoke-pipe, which had been erected in a building of which he was sub-lessee. On the 19th of February they were sold for city taxes due by him, and bought by the plaintiff ; but the whole purchase money not being paid, they were left in charge of the city chamberlain. On the 23rd he settled the balance, and was removing the goods on the 26th, when they were seized for rent due to the original landlord.

Held, that they were liable to such seizure.

Held, also, that the goods could not be considered as in the custody of the law after the sale on the 19th of February.

REPLEVIN, for an engine boiler and carriage for same, and a smoke-pipe.

Pleas.—1. That defendant did not detain the goods. 2. That the property was not the plaintiff's.

At the trial, at Toronto, before *Draper*, C. J., it appeared that the property in question had been that of one John Cozens, and was situated upon St. Lawrence wharf, in the city of Toronto. The person under whom Cozens held title was indebted for rent of the wharf in £200, due on the 1st of July, 1857, and which remained unpaid. There was due from Cozens for city taxes the sum of £70 16s. 8d., and the collector of that ward of the city seized the property in question on the 29th of January, 1858, and caused the same to be sold through an auctioneer on the 19th of February after. The plaintiff, a brother-in-law of Cozens, bought the same at the sale, and £20 in money was paid and a note given for the remainder, but this was not done till the 23rd of March. In the meantime, by arrangement between the plaintiff, Cozens, and the collector, the premises where the property was upon the wharf were placed in the hands of the city chamberlain, who was to retain the same until the plaintiff paid the amount of the taxes. They were arranged on the 23rd of March in the way mentioned, and on the 24th of March the plaintiff commenced removing the property. On the 26th the bailiff of the landlord, who claimed the rent due for the wharf, seized the goods by the landlord's warrant, and sold them on the 3rd of April at auction, and the defendant purchased. He did so at the request of the agent of the landlord, and did not pay any money himself. Cozens stated that the plaintiff was a shoemaker by trade, and that when the engine was about to be removed, on the 24th of March, it was to be taken to St. Catharines, where he had negotiated a sale of it for the plaintiff for £150. After the property was replevied from the defendant, when he bought, it was carried to St. Catherine's in a vessel belonging to Cozens. When the landlord's bailiff seized, the plaintiff told him not to take the articles, as he claimed them, but at the sale he did not forbid the defendant purchasing, though he said he had bought them, and it was hard he should lose them.

A verdict was taken for the defendant, with leave to the

plaintiff to move to enter a verdict in his favour for 20s., if the court should be of opinion that upon the law and evidence the plaintiff ought to recover, and the court might draw all such inferences from the evidence as a jury might.

McMichael obtained a rule to shew cause why a verdict should not be entered for the plaintiff according to the leave reserved, or for a new trial, on the ground that the verdict was contrary to law and evidence, and for misdirection of the learned judge who tried the cause.—He cited *Lee v. Bayes*, 18 C. B. 599.

Anderson shewed cause, and cited *Peacock v. Purvis*, 2 B. & B. 362; *Wharton v. Naylor*, 12 Q. B. 673.

ROBINSON, C. J., delivered the judgment of the court.

The question is (and we do not see that there is ground for raising any other question upon the evidence) whether the goods, as they stood on the wharf, were under the circumstances liable to be distrained for the rent due to the landlord, not by Cozens or Langton, but by a third party. They were seized by the bailiff under a distress warrant on the 25th or 26th of March, and were sold on the 3rd of April.

On the 23rd of March, whatever might have been the case before, the plaintiff, Langton, acquired the right to take away the boiler. He had bought it on the 19th of February before, but by an agreement with the party at whose instance it was sold, he had time given him to pay for it, and could not obtain possession till he had done so, or had made a satisfactory arrangement for the payment. That it seems was done on the 23rd of March. The plaintiff was then at liberty to move the boiler and pipe. They were no longer in the custody of the law, if indeed they were after the sale on the 19th of February, which we do not think they were.

This being so they lay there as the plaintiff's goods upon premises for which rent was due; and the question is, why should they not be liable to seizure as any other person's goods would be that happened to be on the premises for which rent was due? It is not pretended that they were protected from distress by any privilege granted for the

encouragement and protection of trade. They were not goods sent there by the owner to be stored or to be repaired. The boiler seems to have been set up on the wharf with the engine for some purpose for which it was no longer required, and was about to be taken down and removed.

The terms of the public sale to the plaintiff for city taxes were £10 per cent. cash, and the remainder on the removal of the goods.

The boiler and pipe were the plaintiff's goods lying there for his convenience. They were merely subject to a lien for the price, which lien was removed on the 23rd of March, and they were distrained on the 25th or 26th. We do not think that we can hold they were in the custody of the law from the 19th of February till the payment was arranged for.

We think they were in no other situation, legally speaking, than they would have been if Cozens had by private sale disposed of them to the plaintiff, and before the plaintiff took them away a distress warrant for rent had come, and they had been seized, in which case we know no ground on which it could have been claimed that they were exempt from distress.

Rule discharged.

HAACKE V. THE MUNICIPALITY OF MARKHAM.

By-law to establish school sections—Want of certainty.

Held, that the by-law set out below was bad for not describing or defining with sufficient certainty the limits of the school sections intended to be established by it.

M. C. Cameron moved to set aside a by-law of the defendants, passed on the 22nd of December, 1855, for establishing new school sections in that township, or so much of it as affected school section 16, as it had before existed, on the following grounds :

1st. That it is vague and uncertain, not sufficiently defining the limits of the several sections, neither making them embrace certain lots or parts of lots, nor describing them by metes and bounds.

2ndly. That it was passed without the consent of a majority of the householders and freeholders of the several sections, and especially of the said section formerly called section sixteen.

3rdly. And because no meeting of the householders and freeholders of such section was called before the passing of this by-law, to consider the proposed alterations.

The by-law enacted, that thereafter, "the school sections, and union school sections of the township shall embrace such lots and parts of lots as are designated by the red lines on the plan annexed, and that the several sections and union sections shall be known by the letter or number marked on each respectively."

This plan, according to the copy returned with the by-law, did not make the sections respectively consist of certain lots in the township, nor of any expressed proportion of lots, as of the east or west half or quarter of lots, &c., but lines were run across lots in very many instances, and especially in that part which formerly composed school section sixteen, without anything to guide one, but the eye, or by measurement on the plan, on which no scale was expressed, in determining what part or proportion of each lot that had been divided belonged to one section or another.

There was no proof of any request by the inhabitants of section sixteen, or any other section, to pass the present by-law, nor any such proof of such notice having been given of the intention to pass such a by-law, or of a meeting having been called, as it would have been necessary to shew, when such steps are by law required to be taken.

On the side of the municipality, it was sworn that the intended division made by the by-law was well understood in the township, and that the want of precision in regard to limits had given rise to no difficulty.

On the other side, it was sworn that the by-law having been generally considered as illegal had not been enforced or acted upon : that the inhabitants of the old section sixteen had always since gone on acting under the old law, and raising rates accordingly, without regarding the new division, which assigned various portions of it to other sections: that

it was only lately that the municipality had attempted to enforce the new arrangement: that several ratepayers had resisted payment of the school rates attempted to be levied in conformity to the new divisions, and that several actions had been brought in consequence, and were pending.

Eccles, Q. C., shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

We have considered whether we should not abstain from acting on this application till some one or more of the actions have been terminated, but upon reflection we think we shall do what is most advisable for all parties, and best for the public, in deciding without delay upon that objection which applies to the alleged defect in the by-law itself, in not properly defining the limits of the school divisions. It is very clear to us that on account of that defect the by-law cannot be upheld, and there seems in the papers before us to be much reason to believe that notice was not given to the ratepayers of the changes intended to be made, such as could make them aware of the nature of them, and give them an opportunity of being heard against them. But it is upon the first ground only that we make the rule absolute.

Rule absolute.

HARDING V. KNOWLSON ET AL.

Appeal—Chattel mortgage—Affidavit—"Creditor" for "creditors"—20 Vic., ch. 3.

A case settled by consent in the County Court, without pleadings, is not appealable.

An affidavit under 20 Vic., ch. 3, that the chattel-mortgage was not made for the purpose of "preventing the creditor," (instead of creditors) "of such mortgagor obtaining payment of any claims against him." *Held*, insufficient.

APPEAL from the County Court of the United Counties of York and Peel.

This was an interpleader issue under an order of that court, bearing date the 3rd of December, 1858; and by consent of the parties, a case was stated for the opinion of the court without any pleadings.

The plaintiff claimed under a chattel mortgage which had been duly filed with his own affidavit annexed, following in every respect the directions of the 20 Vic., ch. 3, except in the last sentence, where the statement was that the mortgage was not made for the purpose of securing the goods and chattels against the creditors of the mortgagor, or of preventing the *creditor* of such mortgagor from obtaining payment of any claim against him."

The question was, whether this was a sufficient compliance with the statute, where the word *creditors* is required to be used.

The learned judge was of opinion in the negative, and directed judgment to be entered for the defendants; and from this decision the plaintiff appealed.

Freeland, for the appellant, cited *Moyer v. Davidson*, 7 C. P. 521; *Maxwell v. Ferrie*, 8 C. P. 11; *De Forrest et al. v. Bunnell*, 15 U. C. R. 370.

Cameron, Q. C., contra., cited *Nicol v. Boyne*, 10 Bing. 339; *Jackson v. Jackson*, 3 Dowl. 182; *Miller's Bail*, 5 Dowl. 602; *Warren v. De Burgh*, 7 Dowl. 96; *Hatton v. English*, 7 E. & Bl. 94; *Cooke v. Vaughan*, 4. M. & W. 69.

ROBINSON, C. J., delivered the judgment of the court.

We desire not to be considered as giving a formal judgment in this case, for it does not appear to us that a case settled by consent, as this was, can come before us on appeal from the county court.

We think the learned judge of the county court cannot be said to have erred in his judgment, when he determined that the form of affidavit so positively prescribed by the statute must be carefully observed. There seems no doubt something very like the repetition of the same idea in the two passages of the affidavit of the mortgage which are in question in this case. But we cannot hold that on that account the latter may be wholly omitted from the affidavit. The statute positively enacts that the mortgage shall be null and void unless it be filed, with an affidavit made by the

mortgagee, in which he shall swear "that the mortgage was not made for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, *or preventing the creditors of such mortgagor from obtaining payment of any claim against him.*"

The affidavit made in this case closely followed the directions of the statute in all other respects but this, that the word *creditor* is inserted instead of *creditors* in the place where it is last used in the affidavit.

The plaintiff's argument in support of the sufficiency of the affidavit is that the whole of the words, beginning with the words "*or preventing,*" to the end, might without injury to the sense be omitted, and therefore that the variance from one word contained in it cannot signify. But we cannot assert that all of those words might be safely omitted. The object of the legislature was to prevent fraud. They knew how astute people often are when they are meditating a fraud, and their design was to bring the statement they should be required to make so clearly before them that they could not affect to be ignorant of what was meant, and could not shelter themselves under any pretense that they had mistaken the meaning; and if for this purpose the legislature has thought fit to exact a declaration to the same effect in two distinct forms of words, in order to shew more clearly what was meant, our duty is to see that what they have required has been in each case complied with. The latter clause in the affidavit is certainly more definite and precise than the other, and the learned judge of the county court was not wrong in holding that it could not be dispensed with. Then if that form of words was necessary to be used, what is it right to hold respecting the deviation from the statute in substituting *creditor* for *creditors*? I dare say it was a mere mistake in the person who wrote the affidavit. But such mistakes cannot be allowed to have the effect of frittering away the provisions of an act of parliament. *Creditor* and *creditors* do not mean the same thing, and if they did, still that would not justify the departure from the act. We should be legislating if we were to sanction the adoption of equivalent words, for it is impossible to look upon this por-

tion of the statute as directory only. It is as stringent upon the mortgage as it could be made. If the mortgagee really contemplated an evasion in this part of the affidavit, which we do not in the least suspect him of, he might have meant the word "*creditor*" in his own mind to apply to the particular creditor to whom he was giving the mortgage. It is our duty at any rate to guard against any artful attempts at evasion, by insisting upon such an affidavit being made as the statute requires. Several of the cases cited in the argument are instances of less material deviations from words prescribed by statute, which have been held fatal.

We think this appeal must be dismissed with costs.

Appeal dismissed.

HAMILTON AND BROCK ROAD COMPANY V. THE GREAT WESTERN RAILWAY COMPANY.

16 Vic., ch. 54—*Obligation to keep bridge in repair—Right of action by plaintiffs for neglect—Private injury.*

Held, that the Great Western Railway Company were bound by the 5th section of 16 Vic., ch. 54, to maintain in repair the bridge which it allows them to erect.

That bridge forms part of a road leading into the plaintiff's road. *Held*, that the loss of custom and tolls occasioned to the plaintiffs was not sufficient to enable them to maintain an action against defendants for allowing such bridge to fall out of repair.

The declaration set out that the plaintiffs were duly incorporated for the purpose of constructing, maintaining and using a certain road called "The Hamilton and Brock Road," which road they had by their corporate funds completed and used, and at the time of the committing of the grievance complained of were still using, and had the right and intention to continue to use, by permitting the public generally to travel upon the same on payment of certain toll, which they, the plaintiffs, were by law entitled to demand and receive, and were in fact receiving, to their great profit and emolument.

That after the passing of the 16 Vic., ch. 54, the defendants, under the provisions and authority of the said act, did permanently close the channel of the said Desjardins Canal at the eastern extremity thereof, and at the place where the line of the defendants' railroad crossed and inter-

sected the said channel of the said canal, and did erect a bridge over and across the opening or cut through the Burlington heights, at or near the point at which their said railway so crossed, for all Her Majesty's liege subjects, their horses and carriages, free of toll, at all times thereupon, and thereby to pass and re-pass.

That a certain public highway was connected on each side with the said bridge, and by and over which all Her Majesty's subjects aforesaid, and the public generally, were accustomed to travel in passing and re-passing the said bridge towards, to, and from the city of Hamilton.

That the said road of the plaintiffs intersected and met the said lastly mentioned highway at a point near to the said bridge, and thereby became a safe and convenient way for the public, upon payment of toll as aforesaid, to travel to and from the said highway and bridge, and thence over and across the said bridge, to and from the city of Hamilton, and other parts and places, as in fact they had been and were accustomed to do, and but for the grievances hereinafter mentioned would have continued to do, to the great profit and emolument of the plaintiffs.

That under and by virtue of the statute aforesaid, it became and was the duty of the defendants, in making and constructing the said bridge, to make and construct the same safely, commodiously, and with due and proper care, skill and caution, and so to keep and maintain the same for all Her Majesty's subjects, their horses and carriages, free of toll, at all times thereupon and thereby to pass and re-pass.

That although the defendants did make and construct the bridge aforesaid at the place aforesaid, and although the same was for some time used and travelled by Her Majesty's subjects passing thence, to and from and over the said road of the plaintiffs, yet that the defendants did not make or construct the same safely or commodiously, or with due or proper care, skill or caution, but, on the contrary thereof, made and constructed the same unsafely and incommodiously, and carelessly and negligently, and with bad and insufficient materials, and unskilfully and insufficiently, and

thereby the said bridge, afterwards, and whilst the plaintiff's said road was so being used as aforesaid, was blown down and fell through, and became useless, and unfit, and unsafe for Her Majesty's subjects to use ; and the defendants also wrongfully, carelessly, and negligently suffered and permitted the same so to remain and continue for a long space of time, to wit, for six months, during which time they neglected to repair and amend the same ; and the defendants carelessly and negligently, and contrary to the statute aforesaid, omitted to keep and maintain the said bridge safely and commodiously. By means of which several grievances, all Her Majesty's subjects who had been accustomed to use and travel upon the plaintiff's said road for toll as aforesaid, in order to cross the said bridge and the said channel of the said canal, and to pay toll to the plaintiffs as aforesaid, had ceased to do so, and the plaintiffs had thereby, and by reason of the said grievances, been deprived of great gains, profit and emoluments, which but for the said grievances they would have derived from their said road.

The defendants demurred, on the following grounds :

That the declaration does not shew that the plaintiffs have any peculiar or private property or interest in the bridge in the declaration mentioned to have been blown down, nor any right to have a bridge maintained, so as to give them any civil action against the defendants for the destruction or non-maintenance thereof.

That the alleged damage sustained by the plaintiffs is not such as to give to them any civil action against the defendants in respect thereof.

That the statute in the declaration mentioned does not impose any such duty upon the defendants as in the declaration is alleged ; and even if it does, still the declaration does not set forth any state of facts which would give to the plaintiffs any civil action for the non-compliance of the defendants with the provisions of the said statute.

Gwynne, Q. C., for the demurrer, cited *Streetsville Plank Road Company v. Hamilton and Toronto Railway Company*,

13 U. C. R. 600; Regina v. Great Western Railway Company, 12 U. C. R. 250; Hubert v. Groves, 1 Esp. 148; Greasley v. Codling, 2 Bing. 263; 16 Vic., ch. 54.

Burton, contra, cited Wilkes v. Hungerford Market Company, 2 Bing. N. C. 281; Jarvis v. Great Western Railway Company, 8 C. P. 115.

ROBINSON, C. J., delivered the judgment of the court.

There can be no doubt, we think, that the fifth section of the statute 16 Vic., ch. 54, does make it incumbent on the defendants to maintain in a proper state of repair the bridge which they were by that act allowed to make over the eastern extremity of the Desjardins Canal: that is, if they and not the Desjardins Canal Company did erect the bridge, they should be *prima facie* held bound to maintain it.

But the real question in this case is whether their failure to do so gives any right of action to the plaintiffs. We think it does not. It does not appear in the declaration whether before the defendants were allowed to close up the canal at the point referred to, there had been any bridge which the public could pass and repass between the city of Hamilton and the plaintiffs' road. If there had not been, it then would make the plaintiffs' complaint a less reasonable one, though that might not of itself be an objection to their right of action. But we do not think the ground on which the plaintiffs endeavoured to sustain the right of action can be held sufficient.

If the defendants did suffer the bridge to be for a time out of repair, so that the public could not safely and conveniently pass over, that no doubt would be a wrong done to the public, who had a right to use the alleged highway between Hamilton and the plaintiffs' toll road, of which alleged highway we think we must take the bridge in question to form a part. That would in the first place point to a prosecution by the Crown for the public wrong, and would not give to each of the many individuals who might be incommoded by the nuisance a right to bring a separate action for his share of the injury.

When the circumstances in any such case have been such

as to occasion a special injury to a particular person, then such person has been allowed to maintain an action for his particular damage. The cases illustrating the application of this principle are numerous, and, as we might expect, they are not at all easy to be reconciled with each other, for it is most difficult in such cases to draw a line shewing what kind of injury can be fairly treated as a particular injury, and what such an injury only as should be looked upon as the individual's share of public inconvenience, for which the remedy must be sought by a public prosecution.

It appears to us that the complaint that the defendants allowed a bridge to be out of repair, (which is not a malfeasance, but a non-feasance,) forming part of a road which led into the toll-road of the plaintiffs, by which means the plaintiff lost much custom that would otherwise have come to their toll-road by that feeder, if we may call it so, is a complaint of too indirect an injury to sustain such an action. Upon the same principle any inn-keeper, who lived upon the road at either end of the bridge, or every person who kept a place of public amusement beyond the bridge, to which the inhabitants of Hamilton had been in the habit of resorting, might bring a private action for the loss of custom; and it would be difficult indeed to deny the right of action of every tradesman who had lived upon the road to sue for loss of custom in consequence of the bridge being out of repair. And the peculiarity of this case is, that the plaintiffs have no direct interest in the highway of which the bridge in question forms a part: they merely own a toll-road, which that highway intersects, or leads into; and if the principle they contend for should be admitted, then they would have the same right of action on account of any other part of any other highway, whether a bridge or otherwise, being suffered to be out of repair, provided they could shew that some of the persons using such highway would, in the ordinary course of things, probably have occasion to go from it into their road, and along their road far enough to subject them to toll. At what distance could we say that the part of any other road that is out of repair ought to be from their road to make it right to hold that the principle should not apply? We do not see how a line could properly be drawn.

This seems to us to be an attempt to push the principle considerably further than was done in *Wilkes v. The Hungerford Market Company* (2 Bing. N. C. 281), though undoubtedly the plaintiffs' action appears to receive a good deal of support from the language of the judgment given in that case. There was, however, in the case referred to, an actual obstruction of a thoroughfare, upon the very side of which the plaintiff's shop was situated. Here the complaint is, that the plaintiffs receive less toll upon their road, because another road which crosses it, or leads into it, has been suffered to go out of repair.

We do not see why the owners of public stages along any part of the plaintiffs' road should not have the same right of action, nor why the proprietors of toll-roads in all parts of the province should not have a right of action against the proprietors of all other roads communicating with theirs, which are suffered in any part of them to get out of repair.

That this is, so far as we know, the first instance of such an action being brought, under similar circumstances, is at least an argument against it.

The case cited of *The Streetsville Plank Road Company* against the *Hamilton and Toronto Railway Company* (13 U. C. R. 600), is very distinguishable from the present, because in that case the plaintiffs' road was rendered almost impassable for loaded teams, by the obstruction which the defendants for their own purposes had placed across it.

The defendants are entitled to judgment, we think, on this demurrer.

Judgment for defendants on demurrer.

MCCOLLUM V. WILSON ET AL.

Conveyance—Description of the land—Construction of.

"Part of broken lot number ninety-four and number ninety-five and ninety-six," means part of number ninety-four, and the whole of ninety-five and ninety-six; but

Held, Burns, J., dissenting, that in this case the particular description by metes and bound in the deed so clearly excluded part of ninety-five as to control the general words preceding, and prevent the whole from passing.

This was an action of ejectment for the recovery of the warehouse and wharf, in the village of Antrim, in the town-

ship of Howard, in the county of Kent, being part of the easterly half of lot number ninety-five, in the broken front concession on lake Erie, in the said township of Howard.

The plaintiff in the action claimed title as purchaser at sheriff's sale, under a writ of *fi. fa.* against the lands of one Robert Ruddle, issued in a cause in the county court of the county of Kent, wherein one Walter McCrea was plaintiff, and the said Robert Ruddle defendant, under the deed of the sheriff of Kent to him as such purchaser.

The defendants claimed title in themselves, under a mortgage from the said Robert Ruddle to the defendant, John Jamieson, prior to the writ of *fi. fa.* under which the plaintiff claimed.

At the trial at Chatham, before *Burns, J.*, the title was admitted to have been in Robert Ruddle.

The plaintiff proved the judgment against him before named, entered 19th of December, 1856, for £64 12s. 11d., and £3 7s. 10d. costs: that a *fi. fa.* against goods issued on the 16th of January, 1857, and was returned *nulla bona* on the 26th of April following: that a *fi. fa.* lands issued on the 22nd of April, 1857, was received by the sheriff on the same day, and returned lands on hand on the 26th of April, 1858; and that a *ven. ex.* issued on the same day, upon which the sheriff sold to the plaintiff. The deed from the sheriff to the plaintiff was admitted and put in. It embraced the whole of lots number ninety-four, ninety-five, and ninety-six, in the township of Howard, fronting on lake Erie, conveying all Ruddle's estate therein.

It was admitted that the wharf and warehouse claimed were on the east half of lot number ninety-five.

For the defence, the patent to John Parker of 300 acres, lots numbers ninety-five, ninety-six, and the west half of ninety-four, was put in, dated 30th of September, 1819, described as follows:

All that parcel or tract of land situate in the township of Howard, in the county of Kent, in the western district, in our said province, containing by admeasurement three hundred acres, be the same more or less, being the broken lots number ninety-five and ninety-six, and the west half of the broken lot number ninety-four, on lake Erie, in the said

township of Howard; together with all the woods and waters thereon lying and being, under the reservations, limitations and conditions hereinafter expressed: which said three hundred acres are butted and bounded, or may be otherwise known as follows: that is to say, Commencing on lake Erie, on the south-east side of the allowance for road between the broken lots numbers ninety-six and ninety-seven, and at the southerly angle of the said lot number ninety-six; then north forty-five degrees west, sixty-eight chains, more or less, to the allowance for road in the rear of the said lot number ninety-six, on the south side of Talbot road west; then north forty-five degrees east, fifty chains, more or less, to the centre of the broken lot number ninety-four; then south forty-five degrees east, forty-five chains, more or less, to lake Erie; then southerly along the water's edge to the place of beginning.

It was admitted that John Parker conveyed to Robert Ruddle.

The defendants then put in the mortgage under which they claimed, from Robert Ruddle, William Ruddle, and James Ruddle, to John Jamieson, dated 23rd of February, 1838. In this the land was described as:

"All and singular those certain parcels and tracts of land and premises, situate, lying and being in the township of Howard, in the county of Kent, in the Western District, and province of Upper Canada aforesaid, known as part of broken lot number ninety-four, and number ninety-five and ninety-six, in the county of Kent, in the Western District, and province aforesaid, and which lots are butted and bounded, or may be otherwise known as follows: that is to say, lot number ninety-four, commencing at the eastern angle of said lot, on a course north forty-five degrees west, forty-six chains; thence south forty-five degrees west, nineteen chains, seventy links; thence south forty-five degrees east, fifty-four chains, more or less, to the water's edge of lake Erie; thence northerly, along the water's edge of the said lake, to the place of beginning in lot number ninety-four.

"Also lot number ninety-five, commencing nine chains and forty links, on a course south forty-five degrees west, from, the northerly angle of said lot number ninety-five; then south forty-five degrees east, fifty-four chains, more or less,

to lake Erie ; then south-westerly, along the shore of the said lake, to the distance of six chains, fifty links, at right angles, beyond the limit between lot numbers ninety-five and ninety-six ; then north forty-five degrees west, sixty one chains, more or less, to the rear of the said lot number ninety-six ; then north forty-five degrees east, sixteen chains, ninety links, to the place of beginning.

“Also lot number ninety-six, commencing at the south-west angle of the said lot ; thence north forty-five degrees west, sixty-nine chains, more or less, to the northern boundary of said lot ; thence north forty-five degrees east, fifteen chains ; thence south forty-five degrees east, sixty-one chains, more or less, to lake Erie ; thence southerly, along the shore of said lake, to the place of beginning, containing in all by admeasurement three hundred acres of land, be the same more or less, together with all houses, out-houses, woods, ways, waters and water-courses, thereon erected, lying and being, and all the appurtenances and privileges thereunto belonging.

“To have and to hold the same, unto him, the said John Jamieson, his heirs and assigns, to the sole and proper use, benefit and behoof of the said John Jamieson, his heirs and assigns for ever, under the restrictions, limitations and conditions expressed in the original grant from the crown : *Save and except* the following building lots, in the village of Antrim, as laid out by Samuel Smith, Provincial Deputy-Surveyor, in his plan of said village of Antrim, dated the year one thousand eight hundred and thirty-four, viz., number one, on Robert street ; numbers two, three, four, five, six, seven, eight, nine and ten, on Erie street ; number one, corner of Smith and Robert streets west ; numbers one, two, three, four, five, six and seven, on William street ; numbers one, two, three, four and five, on Lake street ; and number one on St. David street.”

The mortgage was admitted.

A verdict was taken by consent for the plaintiffs, subject to the opinion of the court as to whether this mortgage covered the east half of lot number ninety-five. If it should be so construed by the court, the verdict to stand : if otherwise, a verdict to be entered for defendants.

Becher, Q. C., for the plaintiff.

J. Wilson, Q. C., and *Christopher Robinson*, for the defendants, cited *Doe Miller v. Dixon*, 4 O. S. 101; *Doe Gildersleeve v. Kennedy*, 5 U. C. R. 402; *Doe Burt*, 1 T. R. 704; *Doe Raikes v. Anderson*, 1 Stark, N. P. C. 155; *Tay. Ev.* 961, 962.

It was contended for the plaintiff that the word "part" in the general description referred to lot number ninety-five, as well as to ninety-four; and that, even if this were not so, the general description must be controlled by the metes and bounds given in the particular description: that that description referred only to part of this lot, and clearly did not cover the east half; and that the mortgage must be construed by itself, without reference to any matter out of it.

For the defence, it was contended that the whole of lot number ninety-five passed under the mortgage, by means of the particular description of number ninety-four running over and taking in part of number ninety-five, so that nine chains and forty links was not excluded, and this, defendants contended, because it was only *part* of number ninety-four that was conveyed, and not the whole: or that the whole of number ninety-five passed, because the mortgage purported to transfer the whole, though the particular description did exclude nine chains and forty links of number ninety-five, and ran over into number ninety-six; so that in either way this mortgage covered the whole of number ninety-five.

That the patent aided the construction of the mortgage, and that the description of part of lot number ninety-four should be taken to begin, not at the easterly angle of the lot, but at the angle of that part which Ruddle owned; and then the different descriptions put together would cover the whole front—and it would require that in order to convey 300 acres.

ROBINSON, C. J.—The question turns wholly upon the construction of a mortgage, made on the 23rd of February, 1858, by Robert, William and James Ruddle, to John Jamieson, of all and singular those certain parcels and tracts of land and premises, situate, lying and being in the

township of Howard, in the county of Kent, in the western district, and province of Upper Canada aforesaid, known as part of broken lot number ninety-four, and lots number ninety-five and ninety-six, in the county of Kent, in the western district, and province aforesaid; and which lots are butted and bounded, or may be otherwise known as follows: that is to say, lot number ninety-four, commencing, &c., giving the boundaries, &c.

“Also, lot number ninety-five, commencing nine chains and forty links on a course south forty-five degrees west from the northerly angle of the said lot number ninety-five; then south forty-five degrees east, fifty-four chains, more or less, to lake Erie; then south-westerly along the shore of the said lake to the distance of six chains fifty links at right angles beyond the limit between lots numbers ninety-five and ninety-six; then north forty-five degrees west, sixty-one chains, more or less, to the rear of the said lot number ninety-six; then north forty-five degrees east, sixteen chains ninety links to the place of beginning.”

If the courses and distances had been wholly omitted, and these premises been described only in the general terms before expressed—that is, “known as part of broken lot number ninety-four, and number ninety-five and ninety-six, in, &c.” I should have thought that the deed conveyed a part of ninety-four only; but what part would have been so uncertain, both as to position and quantity, that the grant as to that part must have been held void; and that it covered the whole of lots numbers ninety-five and ninety-six, for otherwise the deed would have been as uncertain in regard to those two lots as the other, and the words would have admitted of those two entire lots passing, because the deed does not say *parts* of, &c., but *part* of lot number ninety-four, which would be correct if meant to be applied to one lot only, but not strictly correct if portions of three lots were intended to pass. Neither does the deed say parts of lots numbers ninety-four, ninety-five, &c., but part of lot number ninety-four; and besides, the word “of” is not repeated, and so is only prefixed to the number ninety-four, as if that were the only lot of which the whole was not granted.

It has been very common, both in patents and deeds, to describe lands granted thus: "part of lot number nine and lot number ten in such a concession, &c.," and so far as my knowledge extends that has been always understood to mean part of the one lot and the whole of the other. If the language of this deed had been, part of lot number ninety-four and the *whole* of lot number ninety-five, there could have been no room for a question; but there is really no difference between "number ninety-five" and "the whole of number ninety-five." The words "*the whole of*" would be redundant in such a case, and would be equally so here, unless we should hold that the words "part of" belong as much to the other two lots as they do to the lot number ninety-four, which, for the reason I have stated, I do not think they do.

But then we must take the whole of the deed together, in order to ascertain its meaning; and when we read the description given of the several parcels of land, I feel no doubt, I must say, that whatever the parties may have understood or meant to express, they have given so particular a description, and such a description, of what they meant in regard to the lot number ninety-five, which alone is in question in this action, that we cannot hold that the whole of lot number ninety-five was intended to pass, but must conclude, judging only from the deed, that the grantor did intend the words "part of" to extend to the lot number ninety-five as well as ninety-four. We cannot hold otherwise, I think, because the description is such as to show that he was advisedly granting a part, and not the whole of that lot; for he commences at a point nine chains and forty links on a course south forty-five degrees west from the *northerly angle of the said lot number ninety-five*, which point is nearly in the middle of the lot, and the description only embraces land west of that point. That is very clear; and it follows, I think, that we cannot hold the whole lot to have passed under the deed to the defendant. It may be that in framing the description a blunder was committed in describing the land intended to be granted, for the manner in which the part of lot number ninety-four

is described, shows that the description was framed by a person who was either not experienced in such matters, or did not intend to frame the description properly.

There may be a remedy to be obtained in equity, if there has been a mistake committed, or anything done intentionally wrong to the prejudice of the person taking the mortgage ; but upon the case submitted to us, I think our judgment must be for the plaintiff.

MCLEAN, J.—The plaintiff claims to recover nine chains and forty links in width on the east side of lot number ninety-five, in the first concession on lake Erie, in the township of Howard, extending from the lake shore to the rear of the concession.

The defendant claims the premises under a deed to him, bearing date the 23rd day of October, 1838, for *part of broken lot* number *ninety-four* and number *ninety-five* and *ninety-six*, and the deed reports to give a particular description of each of these lots as conveyed, but it is manifestly inaccurate. Number ninety-four is said to commence at the eastern angle of that lot, on a course north forty-five degrees west fifty-six chains. This commencement cannot very readily be understood ; but if after the word “ lot ” the word “ thence ” is inserted it becomes intelligible ; and the subsequent courses and distances seem to include, not *a part*, but the *whole* of lot number ninety-four. By the eastern angle it appears from the courses and distances given that the *south-east* angle on Lake Erie is intended, and from thence the course is north forty-five degrees west, forty-six chains ; thence south forty-five degrees west, nineteen chains, seventy links ; thence south forty-five degrees east, fifty-four chains, more or less, to the water's edge of lake Erie ; thence northerly along the water's edge of the said lake to the *place of beginning in lot ninety-four*. It is difficult to understand why the deed should express only a *part* of lot number ninety-four as being conveyed, while the description certainly embraces the whole lot ; and then the closing words of the description “ *in lot number ninety-four,* ” seem to convey an inference that more was intended to be

included than lot number ninety-four only. If the starting point on Lake Erie were in the centre of lot number ninety-four, as it might be if part only belonged to the grantor, and that part was all that was intended to be conveyed, the distances specified in the northern boundary, nineteen chains seventy links, would cover that part of lot number ninety-five now in dispute, and it is possible that may have been what was intended. In that case the *part* to be conveyed being so described, and the particular specification of the place of beginning *on lot number ninety-four* could be without difficulty understood. At present there is nothing before us to explain the reason (if there was any) for using those terms. It is probable, however, that it can be established by proof whether the party under whom the defendant claims had the whole of lot number ninety-four, or only half of it, to convey at the time the deed was given. The description of lot number ninety-five, though professing at its commencement to be for that particular lot, runs six chains and fifty links on a course at right angles with the side lines into lot number ninety-six, and this seems to strengthen the conjecture that the description for the *part* of number ninety-four intended to be conveyed may have covered also a part of number ninety-five. The boundaries, however, as given for this latter lot in the deed to defendant do not support such a view. It is stated as commencing nine chains and forty links on a course south forty-five degrees west from the northerly angle of the said lot number ninety-five. What is meant by the *northerly* angle appears by the subsequent courses and distances : thence south forty-five degrees east fifty-four chains, more or less, to Lake Erie, being precisely the length of the western line given as the boundary of lot number ninety-four, though the western boundaries of each of the lots are all longer than the eastern. Then south-westerly along the shore of the said lake to the distance of six chains fifty links, at right angles beyond the limit between lots numbers ninety-five and ninety-six ; then north forty-five degrees west sixty-one chains, more or less, to the rear of the said lot number ninety-six. Then north forty-five degrees east sixteen chains ninety links to the place of

beginning. The width intended to be given in the original survey to the several lots does not appear by either of the plans put in ; and if we are to judge from the measurement marked on one of these plans, each differ from the other in width. Thus the width given in the defendants' deed at the northern boundary of lot number ninety-four appears to be nineteen chains and *seventy* links : but on the plan, taking the several distances as they appear on it, the width is only nineteen chains and thirty-nine links. The width of lot number ninety-five appears to be nine chains and forty links, now in dispute, and ten chains and forty links included with six chains and fifty links of number ninety-six, together sixteen chains and ninety links in the deed, thus making lot number ninety-five, nineteen chains and eighty links. Number ninety-six, if the measurements are correct, must contain twenty-one chains and fifteen links in rear, being fourteen chains and sixty-five links, described in the deed as part of lot number ninety-six ; and six chains and fifty links included in the measurement with lot number ninety-five. I do not know that the variance thus appearing in the width of several lots can be of any importance in this particular case, but as it is probable that in the original survey it was intended that the lots should all be of the same width, the difference may serve to shew that the measurements have been inaccurate, either in the first survey or in that which the plan professes to represent.

With the information and plans now before us, and taking the place of commencement in lot number ninety-five as at the distance of nine chains and forty links from the northeast angle, called the northerly angle, it seems impossible to hold that the premises in question are included in the description contained in the deed.

The distance given in the deed for part of lot number ninety-five, including six chains and fifty links of lot number ninety-six, is stated at sixteen chains and ninety links, or ten chains and forty links of lot number ninety-five. This with nine chains and forty links, the width of the premises in dispute, would make that lot nineteen chains and eighty links wide in rear. If it was intended that the line in rear

of the part of lot number ninety-six included in the description with lot number ninety-five, should extend eastward as far as the northerly angle, as it is called, of lot number ninety-five, the distance would be twenty-six chains and thirty links instead of sixteen chains and ninety links.

From the deed professing to convey *part* of broken lot number ninety-four and number ninety-five, it may be assumed that the intention was to convey the *whole* of lot number ninety-five and part of lot number ninety-four; but it in fact conveys only *part* of number ninety-five, and the whole of lot number ninety-four, according to the specific descriptions given; and these must be taken to control the designation of the lots by numbers, and to point out the particular portions of each intended to be conveyed. On these grounds I think the plaintiff is entitled to succeed in this action, and that judgment must be given for him on the facts stated.

BURNS, J.—At the trial I was of opinion that the deed of mortgage should be read that the whole of lots numbers ninety-five and ninety-six would pass to the defendant, though the description of ninety-five certainly did omit a portion of the lot. Upon reflection, I still continue of that opinion.

The deed professes to convey all and singular part of broken lot number ninety-four, and number ninety-five and ninety-six. If nothing more than this appeared, I think there can be no question that we should hold that the whole of ninety-five and the whole of ninety-six passed, and that as to lot number ninety-four that would be void for uncertainty. The argument for the plaintiff is, that *part of* should be held to over-ride ninety-five and ninety-six, as well as ninety-four; and we are referred to the descriptions, wherein it appears certainly that the whole of lot number ninety-five is not described. If there be any value in the plaintiff's argument, that the words *part of* should be so construed, then it must apply to lot number ninety-six, as well as lot ninety-five. When we look at the descriptions, however, we find that they do cover the whole of lot number ninety-six, though bungling-

ly done, by mixing up part of lot number ninety-six with part of number ninety-five. The description, therefore, so far as it affects lot number ninety-six, does not carry out the plaintiff's proposition, that a part of that lot was only intended to be granted. Then, will the description of part of lot number ninety-five cut down the words before used granting the whole lot, and will they afford evidence that the parties meant that only part of lot ninety-five was granted, as that part of lot ninety-four was granted? Looking at the description of lot number ninety-four, instead of a part of it being granted, in fact the whole is granted,—that is, if we make an allowance for a somewhat rather absurd thing in the commencement of that description. The description commences at the eastern angle of the lot, and it says on a course north forty-five degrees west forty-six chains. What was meant, I apprehend, was that a distance of forty-six chains should be run on that course from the corner. Then running across the lot nineteen chains seventy links, embracing the whole width of it, shows that in point of fact the description embraced the whole, instead of only a part of it. If this be so, then we have the descriptions standing in this way: that they embrace the whole of lot number ninety-six; also the whole of lot number ninety-four, and only part of number ninety-five. The descriptions are therefore inconsistent, both with reading that part of lot number ninety-six was granted and that part of number ninety-four was granted. I apprehend there can be no question, that if the description of number ninety-four would cover the whole lot, it would all pass, though it was before stated that part of it was granted, for a particular description may enlarge such a general one as part of the lot. The converse of that, I apprehend, will not cut down such general description, unless it be clear from the deed that such was the intention. Now I have shewn that no such intention can exist with regard to lot number ninety-six; and with regard to ninety-four, the intention, as evinced by the particular description, is to enlarge and not cut down the quantity. Then as to lot number ninety-five, the first words would undoubtedly give the defendant the whole of

that lot, and the description just as undoubtedly gives only part of it to him. The intention to give part of each of the three lots is out of the question ; and it appears to me, upon the principle of construing a grant most strongly against the grantor, we should say, as regards lot number ninety-five, that it cannot be cut down by this description in the deed, any more than saying that part of number ninety-four should only pass, when the description shows that by that the whole would pass.

I think the defendant is therefore entitled to judgment.

Judgment for the plaintiff.

Burns, J., dissenting. (a)

JAMES ZIMMERMAN V. WOODRUFF ET AL., EXECUTORS
OF SAMUEL ZIMMERMAN.

Contract—Assignment of—Right of action—Account stated.

In an action for work and labor against the executors of Z., it appeared that the work was done under two sealed contracts, entered into originally by Z. with one B., who had sub-let one of these contracts to the plaintiff and M., and the other to the plaintiff and D. The plaintiff had, by subsequent agreement with M. and D., respectively, acquired the sole interest in each of these contracts ; but *after* he had done so, on each contract between B. and his sub-contractors an agreement under seal was endorsed, by which B. assigned all his interest in these contracts respectively to Z., and the sub-contractors—the plaintiff and M. in the one case, and the plaintiff and D. in the other—agreed to accept Z. in place of B., and Z. agreed to assume the contracts, as if originally made by him with the sub-contractors. The agreement endorsed on the contract between B. and the plaintiff and D. was not executed by D.

Held, that the plaintiff could not recover alone, the liability being to himself jointly with M. and D. respectively on the respective contracts. The plaintiff also sued on account stated, and relied upon an account made out by defendants' book-keeper, headed as an account of the plaintiff with the estate of Z., including this work and shewing a balance due to him; but the book-keeper stated that it was made out at the plaintiff's request, and on account of the sealed contracts. *Held*, not sufficient to give a right of action to the plaintiff alone.

The plaintiff sued for work done for the defendants' testator, and materials found. 2ndly. For money paid for testator. 3rdly. Money received by the testator for the plaintiff. 4thly. For hire of steam-excavators, horses, carts, steamboat and machinery. 5thly. For an account stated between the plaintiff and the testator, with a second set of counts, stating the work to have been done for the defendants as executors, and so of the other causes of action.

(a) This case has since been appealed, and now stands for judgment in the court above.

The plaintiff claimed by his particulars delivered \$266,427. The defendants pleaded to the first set of counts—

1. That the testator never was indebted to the plaintiff as alleged.

2. Set-off.

3. A judgment in favour of the Bank of Upper Canada against these defendants, as executors of Samuel Zimmerman, for £217,637 gs., besides costs, and that they had only assets to the value of £2,000 towards satisfying the said judgment.

4. Never indebted; to the counts against them for debts contracted by them as executors.

5. Set-off, to the same counts.

The plaintiff replied, that the judgment in favour of the Bank of Upper Canada was obtained by fraud : that Samuel Zimmerman was only indebted to the bank in £10,000, and that the defendants had assets sufficient to satisfy the debt really due, and also to satisfy the plaintiff his demand.

The defendants took issue on this replication.

The plaintiff was nonsuited at the trial, which took place at London, before *Burns, J.*, upon the ground that the work sued for was done for the testator, Samuel Zimmerman, under two sealed contracts, entered into originally by him with one Balsh, who had sub-let one of these contracts to the plaintiff and one McDonald, and the other to the plaintiff and one Dana ; and the plaintiff had, by subsequent agreement with his co-contractors in the several contracts which they had entered into with Balsh, acquired the sole interest in each contract ; and after the plaintiff had thus acquired the sole interest in the two contracts, an agreement under seal was endorsed on each of the contracts between Balsh and his sub-contractors, which agreement was, in regard to one of Balsh's contracts, (that between him and McDonald and the plaintiff,) executed by Balsh, McDonald, this plaintiff, and Samuel Zimmerman the testator, and by it Balsh assigned to Samuel Zimmerman all his right in that contract between him of the one part, and McDonald and the plaintiff of the other. McDonald and the plaintiff on their part agreed to accept Samuel Zimmerman in place

of Balsh, to all intents and purposes the same as though the said Samuel Zimmerman had originally contracted with them instead of the said Balsh. And Samuel Zimmerman on his part contracted that he would assume the within contract to all intents and purposes as if he had originally contracted with them, McDonald and Zimmerman, and that he would save Balsh harmless from his contract with them.

This was executed on the 27th of February, 1857, and on the same day an agreement under the seals of the parties was in like manner endorsed on the other contract between Balsh and the plaintiff, and Dana, and executed under the hands and seals of Balsh, this plaintiff, and Samuel Zimmerman, but not executed by Dana, though it was apparently intended to be executed by him, and was drawn up accordingly. The object and tenor of this writing was precisely the same in relation to this contract as of the other writing in regard to the other.

It was in July, 1856, *some months before these instruments were executed*, that the plaintiff had bought out his co-contractors, McDonald and Dana, in the respective contracts, by writings executed between them, in which he was represented to have purchased their interest for certain sums of money therein contained.

The learned judge held, that under these circumstances there was nothing that could in law discharge the estate of Samuel Zimmerman from his liability to Dana and McDonald, under the sealed agreements between him and each of them jointly with the plaintiff, admitting that the work was no longer to be considered to have been done under the contract between Samuel Zimmerman and Balsh: that if the plaintiff could sue as representing the original interest of the contracting party who had originally contracted for the work with Samuel Zimmerman, he could not sue alone, but only jointly with his co-contractors with Samuel Zimmerman for the work done under each contract respectively, and therefore he nonsuited the plaintiff, who had liberty to move against the nonsuit.

Gwynne, Q. C., accordingly moved for a new trial. 1st,

Because the judge refused to receive secondary evidence of a document, in respect of which a portion of the plaintiff's claim was made. Secondly—Because he ruled that the plaintiff could not on the evidence recover alone on any of the counts. Thirdly—On affidavits.

The affidavit was made by the plaintiff himself. He swore that from the time he bought out his co-contractors, namely, in July, 1856, he was the only person interested in the contract: that after the relinquishment in his favour by Dana and McDonald, he alone performed the work; that Samuel¹ Zimmerman after July, 1856, treated him as the only person to be paid for the work done: that he alone was paid and gave receipts: that the defendants were well aware of this, and dealt with him in the same manner as Samuel Zimmerman had done: that the final estimate rendered by the defendants' engineer of the work done was made out as an estimate of work done by him alone; and that he was taken by surprise by the objection taken at the trial, or he would have had in court the writings by which in July, 1856, Dana and McDonald had sold out to him, and of which he annexed copies. He swore that after they executed these papers they had in fact no interest in the work: that the contract produced at the trial (that between Balsh, the plaintiff, and McDonald,) was not signed by McDonald when he the plaintiff signed it, and that McDonald was not then present: that he believed McDonald signed it after Samuel Zimmerman's death, and for the purpose of throwing an impediment in the way of this suit; and that he was not aware, and had never been informed that the assignment (indorsed) had been signed by McDonald.

The final estimates certified of work done on the two jobs up to October, 1857, described the work as done by the plaintiff and McDonald in the one case, and by the plaintiff and Dana in the other, not by the plaintiff alone.

The plaintiff produced at the trial an account made out on the 29th of March, 1858, by the book-keeper of the defendants, headed as an account of "James Zimmerman with Zimmerman's estate," in which all the payments made to him on account of their railway contracts and other

accounts were charged, amounting to \$181,955 59 cts., which was set against \$199,471 45 cts., stated to be the amount of estimates and extras, and a balance was acknowledged as being due James Zimmerman of \$17,515 86 cts. ; and the plaintiff relied on that as a statement of account of monies due by him from the defendants on which he was entitled to recover as upon account stated.

The work was finished in September or October, 1857.

The defendants' book-keeper swore that the paper made out by him, shewing the value of work done, and the payments made to the plaintiff, was made out at the request of the plaintiff, and he stated that it was done by him on the footing, and on account of the sealed contracts.

It was proved that Samuel Zimmerman was aware before he died, in March, 1857, that the plaintiff had bought out McDonald's and Dana's interest in the two contracts. According to the evidence there seemed no room to doubt that in fact he did know it.

The learned judge considered that the circumstance of Dana not having executed the writing endorsed on the contract with Balsh, dated 27th of February, 1857, was of no consequence, for that Samuel Zimmerman's covenant with the plaintiff and him contained in it would still enure to his benefit, and enable him to sue the estate ; and he thought that the account as between the defendants and the plaintiff, made out by the defendant's book-keeper, and stating a balance as due to the plaintiff of \$17,515, explained as it was by the book-keeper, could not be relied upon as giving a right of action to the plaintiff alone, notwithstanding the legal effect of the sealed instruments.

Simmons v. Wood, 5 Q. B. 170 ; Knowles v. Michel, 13 East, 249 ; Davenport v. Rackstow, 1 C. & P., 89 ; Cocking v. Ward, 1 C. B., 858 ; Teed v. Elworthy, 14 East, 210, were cited in support of the application.

ROBINSON, C. J., delivered the judgment of the court.

We think the learned judge was bound to give way, as he did, to the objection that by reason of the written contract which had been executed between the testator and Balsh,

the plaintiff, James Zimmerman, was unable to sustain an action in his own name alone for the work done. Admitting that the sealed writings, dated the 27th of February, 1857, and endorsed on the two contracts between Balsh and his sub-contractors, had the effect of creating as it were an original agreement between the late Samuel Zimmerman of the one part, and the plaintiff and his co-subcontractor in each case of the other part, and that Balsh was from thenceforth wholly out of the concern, as well in point of legal effect as otherwise, yet Samuel Zimmerman had by those two agreements to which he was a party, rendered himself liable to this plaintiff and McDonald in the one case, and to this plaintiff and Dana in the other, and nothing had been done which could relieve him from that liability, and which could be said to have the effect of leaving him liable to pay the plaintiff alone for the work done to the exclusion of the other party, to whom Samuel Zimmerman had equally bound himself by his covenant; and what makes the case even stronger, if possible, against the plaintiff than it otherwise would be, in regard to his capacity to sue alone, is that these instruments of the 27th of February, 1857, were really executed *after* the plaintiff, according to the evidence, had bought out the interest of his former co-contractor.

Then as to the competency of the plaintiff to sustain his action on the footing of an account stated with himself alone by the defendants through their agent. We doubt whether, if the evidence had been clear in regard to such accounting, it could be regarded as bringing this case within the principle laid down in *Knowles v. Michel* (13 East 249), *Cocking v. Ward* (1 C. B. 858), and the cases cited in them. Those were cases in which the point to be considered was whether the plaintiff could avail himself of the account stated without further evidence of his demand, when there was no appearance even of a strictly legal right of action in any other person as well as of himself upon the same demand. In this case Samuel Zimmerman was bound under seal to pay, not the plaintiff alone, but to pay him jointly with another, and the legal interest of the other party under the deed could never be extinguished by an account stated with one of the

two covenantees. But independently of this, the evidence did not prove such an account with the agent of the executors as shewed that the agent had it in his mind to do more than state the sum due for the work, without reference to the particular parties to whom it was payable; and at any rate he could not change the position of the parties in that respect if he had desired and intended to do so. The case of *Middleditch v. Ellis* (2 Ex. 623), indeed is an express authority against the plaintiff's recovering upon an account stated, even if he alone had been the covenantee with Samuel Zimmerman in the instrument of the 27th of February, 1857. This seems at variance with some previous cases, but it is a deliberate judgment of the Court of Exchequer, and would require to be carefully considered if the facts in the case before us were similar, which they are not.

If we could see how the plaintiff could by any evidence which he has it in his power to give enable himself to recover upon this record at another trial, we should be disposed to take the course taken in *Teed v. Elworthy* (14 East 210), referred to by Mr. Gwynne, and grant a new trial, on payment of the costs of the last trial by the plaintiff, but we cannot see how this could be of any service to the plaintiff.

Rule refused.

JORDAN V. SMITH AND PATTERSON.

Evidence—One joint maker called for the other—Partnership.

One of two defendants sued as joint makers of a note, who allows judgment to go by default, cannot be called as a witness for the other. *Held*, that on the evidence in this case, given below, the jury were justified in finding defendants to be liable as partners, notwithstanding the proof of a dissolution.

This action was upon two promissory notes, signed "J.S. Smith & Co.," as makers, in one of which the promise was to pay the plaintiff £55 8s. 4d. in two months, and in the other to pay the plaintiffs £55 14s. 3d. in three months. Both notes were dated 15th of May, 1857.

Smith allowed judgment to go by default. Patterson pleaded that he did not make the notes.

At the trial at Picton, before *McLean, J.*, the question

was whether Patterson was a partner with Smith when the notes were made, and bound as such by the signature "J. S. Smith & Co."

The defendant, Patterson, desired to call Smith as a witness for him, but the learned judge rejected him.

Patterson had carried on business in Kingston before 1848, solely on his own account. Smith joined him in April, 1848, and their business was carried on under the firm of John Patterson & Company. In June, 1848, they dissolved partnership, as appeared by an instrument produced, signed by both ; and from that time Smith carried on business under the firm of Smith & Company, and a sign in that name of business was put on the shop ; but Patterson always remained in the place of business, taking a most active part in the business, and signing the name of Smith & Co. to notes, letters and receipts, sometimes writing underneath that signature the name *Patterson*, and sometimes not. Smith became insolvent in 1856.

The plaintiff contended that Patterson was still a partner, notwithstanding the instrument that had been executed by him and Smith in June, 1848, which was in Patterson's writing, and witnessed by their book-keeper at the time.

Patterson insisted, on the other hand, that he was only serving Smith in the capacity of salesman and managing clerk, at a salary ; and he produced a writing, by which Smith agreed to give him a salary of £250 for the year from the 1st of October, 1855, to the 1st of October, 1856. The notes sued on were made in May, 1856 ; and if there was a fraud intended in this alleged agreement, and if Patterson had not acted in such a manner as warranted those dealing with *Smith & Co.* in considering him a partner, then of course he could not be held liable upon those notes.

It was admitted that Smith had no partner, if Patterson was not a partner, and no explanation was given of the business being carried on under the name of *Smith & Co.*, if Smith was alone in the business.

The evidence was strong to shew that Patterson acted as having a principal interest in the business, and that he was very generally understood and believed to be a partner ;

that he spoke and wrote of the business as "*our business*," and did whatever a principal could be expected to do; and it was proved that many persons dealing with the firm addressed them on business by letters directed to "Smith & Patterson," and that he never intimated to any one so dealing with the firm that he was not a partner. The books of Smith & Co. were produced, and it did not appear by them that an account had been kept with Patterson as a salaried clerk, and a balance struck, annually or otherwise, as was done with another clerk in the house, and would be usually done as a matter of course; but after a lapse of many years what Patterson had had during the whole period was "written off" in the book, as if settled. The jury found for the plaintiff.

Richards, Q. C., obtained a rule *nisi* for a new trial, on the evidence, and on the ground of surprise, and on affidavits, and also on account of the rejection of the co-defendant Smith as a witness.

Wallbridge, Q. C., shewed cause. *C. S. Patterson* supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

The jury, we think, were well warranted by the evidence in concluding that Patterson either was in fact a partner or had held himself out as a partner by his conduct, and was therefore liable as such to those who dealt with Smith & Co., whatever might have been the private understanding between them. We cannot say that we ought to set aside the verdict, looking at the evidence which was given by many witnesses. The affidavits filed in support of the motion are made by Smith, the other defendant, and by Patterson himself. They both deny the partnership in very distinct and positive terms. But Patterson's testimony could not be taken in his own favour, if we should grant a new trial, nor could the other defendant, Smith, be called as a witness for him, for Smith is a defendant upon the record and in this action: if his evidence should lead to the acquittal of Patterson, it would equally acquit himself, for the plaintiff could not recover against one of the two.

We discharge the rule.

Rule discharged.

IN THE MATTER OF THE CORPORATION OF THE TOWNSHIP
OF ASPHODEL, AND WILLIAM SARGANT, EDWARD PAT-
TERSON, HUGH EWING, AND TIMOTHY MURPHY.

Contested election—Delay in taking the declaration—New election—Refused to act—Mandamus—22 Vic., ch. 99, secs. 122, 124, 130, 183.

Five township councillors were elected at the general election in January. At their first meeting on the 17th, only one made the declaration of qualification, and a doubt having been raised as to the other four in consequence of some employment held by them under the corporation, they delayed in order to consult the county court judge. On the 19th they met again and organised themselves, but on the same day the Reeve for the previous year issued his warrant to elect four other councillors, who were returned; and on the 31st these four, with the man who had first qualified, met and claimed to be the council.

Held, that the second election was invalid, for the parties first elected not having *refused* to qualify, but only delayed, and having done so within the twenty days allowed, there was no ground for a new election.

A mandamus was ordered to the clerk to deliver up the papers to the council first chosen.

This was an application on the part of the corporation against four individuals, to shew by what authority they pretend to be the councillors of the township, and to exercise the powers of the corporation when the offices were full by the election of others at the general election in January last.

The facts were these: five councillors were elected at the general election in January and returned to serve for the year. At their first meeting on Monday, the 17th of January, they all appeared. One of the five made and presented his declaration of qualification, and no question was raised with regard to his being properly a councillor for the township. With respect to the remaining four it seemed an objection was made—but how, or in what manner, and by whom or for what purpose did not clearly appear—that these four were disqualified to act as councillors in consequence of their being engaged during the year previous as commissioners for the expenditure of township moneys, for which services it seemed they had received some remuneration. The four persons delayed qualifying themselves on that day, in order that they might consult or have the opinion of the judge of the county court upon the subject. Nothing was done on the 17th of January, there being only one councillor who had qualified himself. It did not appear that any adjourned meeting was appointed, but the four on that day declined to

qualify themselves. On the 19th of January a requisition was signed and presented to the person who had been reeve of the township for the year 1858, requiring him to issue his warrant, and four others were under that authority elected and returned, and on the 31st of January the four new elected councillors, with the fifth who had been elected at the general election, met and organised themselves as the council of the township. In the meantime, however, the four persons elected at the general election met again on the 19th of January, and filed their declarations of qualification, and organised themselves as the council of the township.

In connection with this application, a rule *nisi* was obtained for a mandamus to James Foley, who was the township clerk, and had been chosen again by the councillors elected under the warrant issued by the reeve, to deliver up to the parties claiming under the first election the seal of the corporation, and all books and papers in his possession.

Read, Q. C., for those elected at the general election of the township, obtained a rule *nisi* calling upon the four persons thus elected under the warrant of the reeve, to shew cause why an information in the nature of a *quo warranto* should not be filed against them in the name of the corporation.

Eccles, Q. C., shewed cause.

The clauses of the statute bearing upon the case are referred to in the judgments.

MCLEAN, J.—The affidavits filed do not shew an absolute refusal to make and subscribe the declaration of office required by the 176th section; on the contrary, they shew that they only declined for the time *until* they could see the judge of the county court relative to the objections raised against them, and that within the twenty days allowed to them they did make and subscribe the declaration of office. The whole difficulty appears to have arisen from the reeve of 1858 having issued a warrant for the election of four members of the council when in fact there were no vacancies in that body. If indeed it could be shewn that the four

persons just elected had absolutely refused to qualify or to accept office, then the issuing of a warrant for a new election would be quite right under the 124th section of the act 22 Vic., ch. 99, which provides for the filling up of vacancies which may occur previous to the organization of the council for the year. Whether there was such absolute refusal as to justify the issue of a warrant to fill up so many vacancies may be tried and decided on the information which is now applied for. It is therefore proper that the rule obtained to shew cause why an information should not issue should be made absolute.

In connexion with the application in this case is one for a mandamus to the clerk of the township council, to deliver over to parties claiming to be the council under the election held on the first Monday in January, all books, papers, and records in his possession. From the affidavits filed, it certainly appears that the issuing of a warrant on the 19th of January for the election of four members of the council, as if there were so many vacancies, was wholly unnecessary, and that the elections held under such warrant cannot be upheld. If so, the council legally elected must be entitled to have possession of the records and books of the township, and the clerk has no right to withhold them. Upon the mandamus *nisi* this point may be contested and decided, should it not be sooner done on the information with respect to the election of members. A mandamus *nisi* will in the meantime issue as moved for.

BURNS, J.—The question presented for adjudication upon this motion is whether the election of the four newly elected persons is legal, or, in other words, whether the four persons who declined to qualify upon the 17th of January, but who did qualify themselves on the 19th, had vacated their seats in the council of the corporation by such neglect or refusal.

We see, by the 183rd section of the Municipal Corporations Act, that twenty days are allowed to every person within which to make and complete his declaration of qualification before he is liable for the penalty imposed under

that section. These twenty days within which the declaration shall be made are to be computed from the time of the person knowing of his election. When the four persons, or any or either of them, knew of their election as councillors at the general election is not shewn, so that we do not know whether they have or not incurred any penalty for not qualifying themselves. The 175th section declares that no one shall enter upon the duties of office until he makes and subscribes the declaration required. Nothing could therefore have been done in the discharge of township duties on the 17th of January, when the five councillors met, for only one qualified himself. It was under the 122nd and 124th sections of the act that the reeve of the former year acted, and issued his warrant for a new election, conceiving that what was done on the 17th of January completely vacated the seats of the four persons who declined to qualify. Whether the former reeve be right in that view must depend upon the construction to be put upon the 130th section. Now it is clear enough that the council is not bound to organise itself on the third Monday in January, for that statute says that it may be done on some day thereafter at noon. It might so happen that it would be impossible for a majority of the elected councillors to be present on that day. Nothing is said whether those present shall adjourn to another day, or that the clerk should give notice thereof. I suppose that might be regulated by the standing orders and rules of the council, as a matter of internal government. The question is therefore whether what the four persons did was equivalent to a positive refusal to take office. It does not appear that they did decline the office: they only declined making the declaration, and that, as stated, until they could have the opinion of others upon the point of objection raised against them. It is an important point to consider upon what evidence it shall be that the reeve of the former year shall act in issuing a warrant for another election under the provisions of the 122nd or 124th sections of the act. In the case before us there is nothing to shew at what time these persons were aware of their elections; and if it were to happen that in any case the person elected did not become

aware of his election until a day or two perhaps before the third Monday in January, we could not hold that he was bound, at the risk of losing his seat, to qualify himself on that day, when we see that he may do it within twenty days after knowledge of his election. If he would lose his seat by reason of not qualifying on that day, and that a new election must be the legal result of his doing so, then this absurdity would follow, either that he would be liable for not qualifying within the twenty days, or if he did qualify within that time then there was no use in it, for that by reason of neglecting or delaying to do so on the third Monday in January his seat might be filled by another person to his exculsion.

It is impossible to lay down any rule as to what amount or what kind of evidence or information should be laid before the former reeve to enable or authorise him to issue his warrant to hold another election, but in this case it does not appear from the information laid before us that he could have had sufficient information or evidence before him. It was a mistake for him to suppose, because the four elected persons did not qualify on the 17th of January, that he had a right to consider the seats so vacated that he should issue his warrant. If the time had then expired within which they should make the declaration of qualification, and it appeared and was made known to him that these persons had unreservedly declined to qualify, of course he then would have been quite right in issuing his warrant. The statute, however, says that the council may organize upon another day besides the third Monday in January; and there appears to be nothing whatever unreasonable, when an objection was made upon the 17th of January to these persons taking their seats as councillors, that they should desire a day or two to consult whether they might not be liable to be unseated on account of disqualification. The reeve was premature in granting his warrant. The elected persons did again meet on the 19th of January, and took upon themselves the duties of councillors. We do not see any thing that should prevent them from doing so.

The rule should be made absolute for an information in

the nature of a *quo warranto*, and if the defendants desire to contest the matter they can plead to the information, and thus take the formal opinion of the court upon the subject.

In the answer of the clerk to the application for a mandamus we do not understand him to make any resistance to it, provided those under whom he acted do not legally constitute the council, and all he desires to do is to deliver the seal to the body which in law is entitled to have the control of it.

We need not further enter into the particulars than as contained in the judgment already given. The result of that application renders it necessary that the rule *nisi* for the mandamus should be made absolute. The defendant, if he contests the right, and contends further that the persons last elected were properly the council of the corporation, may plead to the mandamus, and thus formally take the opinion of the court.

Rule absolute. (a).

CASCADEN V. CONWAY.

Ejectment—Disputed boundary—Evidence.

In ejectment the plaintiff claimed the land in his writ as part of lot number six, the defendant defended for it as part of number five. No notices of title were attached to the record.

Held, that the plaintiff was not bound to prove his title to lot number six.

EJECTMENT to recover that part of lot number six, in the Township of Russell, next to, adjoining, and lying along the southern limit or side line of lot number six, being six rods wide, and extending of that width along the whole southern limit or side line the whole length of the lot.

The defendant, George Conway, appeared and defended for a part of the land mentioned in the writ; that is, that portion claimed by the plaintiff as part of lot number six, but claimed by the defendant as part of lot number five, in the fourth concession, being the north side of lot number

(a) The Chief Justice, having been absent during the argument of this case, gave no judgment.

five, and extending along the northern limit of the said lot number five, the side line being run according to law with the original posts.

No notices of title by either party were attached to the record.

The trial took place before *Richards, J.*, at L'Original. A great deal of evidence was given on the part of the plaintiff to establish some posts, with a view of proving where the line should start from to divide lot number six from lot number five. The plaintiff put in the patent from the Crown to John McDonald for lot number six, a deed from John McDonald to Duncan McDermot for the same land, dated the 18th of June, 1840, another deed from McDermot to Arthur Cascaden, dated July, 1851, and another from Arthur Cascaden to himself, for the south half of the lot, dated the 9th of April, 1852. The last two deeds were properly proved by the subscribing witness, but the deed from John McDonald to McDermot had two subscribing witnesses, one of whom was dead, and the other was not accounted for as being either dead or absent from the province, though the handwriting was proved. No evidence was offered in proof of the hand writing of the grantor. The defendant took the objection at the close of the plaintiff's case, that the plaintiff must fail for want of proof of the conveyance of lot number six from the grantor of the Crown. The plaintiff was in possession of the south half of lot number six, and the defendant in possession of lot number five.

The learned judge gave way to the objection and nonsuited the plaintiff, to which he submitted out of deference to the judge's opinion, that though the question between the parties was a dispute as to boundary between the two lots, yet the plaintiff was bound to prove his title to the south half of lot number six, or that part of it which he claimed.

Crombie, obtained a rule *nisi* to set aside the nonsuit. He cited Har. C. L. P. A. 405; Doe dem. *Gilkison v. Shorey*, 1 U. C. R. 341; *Darling v. Wallace*, 9 U. C. R. 611.

Burns shewed cause.

BURNS, J.—According to the cases cited by Mr. Crombie the defendant correctly enough put upon the record with his appearance a limitation of defence to the piece of land he claimed, and he was right enough to claim it as part of lot number five, as the real dispute between the parties was whether it was part of the one lot or a part of the other. The point we have to determine upon this application now is, what effect that should have upon the proof at the trial, or whether either party should go into proof of title-deeds. This case serves to illustrate that the action of ejectment is not so convenient a mode of settling a question of boundary as that of trespass to the land would be.

I think we must take the defendant to mean this as his answer, "I do not deny that you are the owner of lot number six, but what land you claim as being part of that lot, I say is part of lot number five." The title undoubtedly is in question between the parties in this action, but then is it in question any further than as dependent upon the point to be determined, whether the land in dispute is part of number six? The plaintiff's paper title to lot number six does not help in any way to the solution of that question, and whether the piece in dispute be part of lot number six or part of lot number five, cannot be established by proof of a deed by a witness, which deed professes to transfer lot number six, unless there be something in the deed which would prove something applicable to the soil upon which to start from to run the line. Here there did not appear any thing whatever to be derived from the deed, to help a surveyor or any witness in saying where the corner-stake or post between the lots was. Every thing depended upon the knowledge of the witnessess as to locality.

Suppose upon a record framed as this is, the plaintiff had brought a great many witnesses to prove a long chain of title deeds, thereby, if he succeeded, entailing a heavy expense upon the defendant, might not the defendant say, "You have no right to put me to that expense, inasmuch as I have only denied that the land you claimed formed part of lot number six. You need have only proved that fact, and

I must have failed." It appears to me the defendant would have a good right to say so. If that be so, then, on the other hand, he has no right to say to the plaintiff, "though I claim the land in question to be a part of lot number five, yet you must not only prove that it is part of lot number six, but you must also prove your title deeds to lot number six." No doubt the defendant may, in defending himself, if he thinks it is necessary for him to do so, put the plaintiff to the proof of his title strictly to the lot independent of the question whether the land in dispute forms part of the one lot or part of the other, but the question is whether this record necessarily puts the plaintiff to the proof of both, or whether the defendant is to be understood as limiting the proof to be offered at the trial to the one point, namely, whether in truth the land in dispute is part of lot number six or part of lot number five. It seems to us good sense, and reason, and the great convenience to litigating parties prove that we should understand the defendant as limiting the issue to the latter point.

The nonsuit therefore was wrong, and should be set aside without costs.

MCLEAN, J., concurred.

Rule absolute. (a)

(a) The Chief Justice having been absent during the argument gave no judgment.

REGINA V. MERCER.

Sale of office—Information—5 & 6 Ed. VI., ch. 16, 49 Geo. III., ch. 126 — Scire Facias.

The statute 5 & 6 Ed. VI. against buying and selling of offices, is in force in this country under the 40 Geo. III., ch. 1, as part of the criminal law of England.

Any act done in contravention of that statute is indictable, though not specially made so.

Quare, per *Robinson*, C. J., whether it is also introduced by the 32 Geo. III., ch. 1. which adopts the law of England "in all matters of controversy relative to property and civil rights."

The 49 Geo. III., ch. 126, clearly extends the 5 & 6 Ed. VI., to Upper Canada, and to the office of sheriff—*Foott v. Bullock*, 4 U. C. R. 480, confirmed.

The defendant agreed with R., then sheriff of the county of Norfolk, to give him £500 and an annuity of £300 a year if he would resign; R. accordingly placed his resignation in defendant's hands; the £500 was paid, and certain lands conveyed to secure the annuity; and it was further agreed, that in the event of the resignation being returned, and R. continuing to hold the office, the money should be re-paid and the land re-conveyed, but R. did not undertake in any way to assist in procuring the appointment for defendant. The defendant having been appointed by the government in ignorance of this agreement, an information was filed against him, and *Sci. Fa.* brought to cancel his patent.

Held, that this was an illegal transaction, within the 5 & 6 Ed. VI., and that an information might be sustained under that act without reference to the 49 Geo. III., which clearly prohibited and made it a misdemeanor.

Seemle, that the agreement would also have been an offence at common law.

The ignorance of the government, which was averred in the information as to the illegal agreement, was immaterial.

This was an information filed by the Attorney-General for Upper Canada against the defendant, for a misdemeanor, in having corruptly, and contrary to the form of the statute in such case made and provided, agreed to pay and secure, and for having paid and secured, to Henry Van Allan Rapelje, sheriff of the County of Norfolk, a certain consideration in money therein mentioned, for the resignation by the said Rapelje of his said office, to the intent and purpose that defendant should be appointed thereto.

The first count of the information was as follows :

"Be it remembered, that the Honourable John Alexander Macdonald, Attorney-General for Upper Canada, who for our lady the Queen prosecuteth in his own proper person, cometh here in the court of our said lady the Queen, before the Queen herself, on Monday, the first day of this present term of Trinity, and for our said lady the Queen giveth the court here to understand and be informed, that before and at the time of the committing of the offence hereinafter next

mentioned, the office of sheriff of the County of Norfolk, in Upper Canada, was and is an office touching the execution of justice : that one Henry Van Allan Rapelje was at the time duly appointed and authorized by our sovereign lady the Queen to perform the duties of the said office : that heretofore, to wit, on the 28th of January, 1858, it was corruptly, and contrary to the form of the statute in such case made and provided, agreed for the consideration next hereinafter mentioned by and between Lawrence William Mercer, and the said Henry Van Allan Rapelje, that the said Henry Van Allan Rapelje being appointed to, and entitled to hold and enjoy the said office, should surrender, yield up, and resign and relinquish his said office unto our said sovereign lady the Queen, for the intent and purpose that the said Lawrence William Mercer should be appointed to the same, and receive and take for his own use and benefit all the emoluments and reward which should or might arise therefrom : that in consideration thereof, the said Lawrence William Mercer corruptly, and contrary to the form of the statute in such case made and provided, promised and agreed, that upon the resignation as aforesaid of the said Henry Van Allan Rapelje of his said office, he, the said Lawrence William Mercer, would pay him, the said Henry Van Allan Rapelje, the sum of £500 of lawful money of Canada, and secure and pay to him, the said Henry Van Allan Rapelje, during the natural life of him, the said Henry Van Allan Rapelje, an annuity or yearly income of £300 of lawful money of Canada. And the said Attorney-General doth further give the court to understand and be informed, that in pursuance of the said corrupt and unlawful agreement, and in the terms thereof, afterwards, to wit, on the 28th of January, 1858, the said Henry Van Allan Rapelje, at the special request of the said Lawrence William Mercer, did surrender, yield up, and resign and relinquish his said office of sheriff of the County of Norfolk, with intent and purpose that the said Lawrence William Mercer should be appointed to the same : that the said resignation of the said Henry Van Allan Rapelje was afterwards, to wit, on the second of February, in the year last aforesaid, duly accepted by her majesty the Queen : that afterwards, to

wit, on the said second day of February, in the year last aforesaid, the said Lawrence William Mercer, in pursuance of the said corrupt and unlawful agreement, and by reason of the resignation of the said Henry Van Allan Rapelje consequent on such agreement, but in ignorance thereof by our said lady the Queen, was duly appointed to the said office of sheriff of the County of Norfolk, and authorized to receive the emoluments thereof and reward arising therefrom, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity, whereupon the said Attorney-General, upon behalf of our said lady the Queen, prays the consideration of the court here in the premises, and that due process of law may be awarded against him, the said Lawrence William Mercer, in this behalf to make him answer to our said lady the Queen touching and concerning the premises aforesaid."

There were five other counts in the information, which it is considered unnecessary to give, all charging substantially the same offence, but varied in form in order to meet the evidence. The defendant pleaded not guilty to all.

Scire facias was also brought to cancel the patent appointing the said Lawrence William Mercer, on account of the same alleged agreement, and the defendant demurred to the writ, as shewing nothing sufficient in law to cause the said letters patent to be cancelled.

The circumstances of the case had already been under the consideration of Parliament, and it was agreed that for the purpose of argument certain statements appearing in evidence before a committee of the Legislative Assembly should be taken as the facts of the case, and that the court should be allowed to draw inferences therefrom in the same manner as a jury would be allowed do. It was also agreed that the pleadings on both sides should form part of the special case; and that all questions of a mere formal or technical nature should be waived, with a view to the determination of whatever questions of law arose out of the facts stated with regard to the conduct of the defendant; the substantial question for the opinion of the court being whether, under the facts stated,

the defendant had acted in any manner contrary to law. If the court should be of opinion in the affirmative, the judgment to be entered for the Crown.

The following are the material parts of the evidence taken before the committee of the house :

John Ridout, Esquire, Registrar of the County of York, in compliance with the order of the committee to lay before it copies of all conveyances, bonds, agreements, memorials, &c., in connexion with the subject before it, produced two papers, one a memorial of an indenture of bargain and sale, dated the 30th of January, and recorded the 8th of February, 1858, from Mercer and wife to Rapelje, in consideration of £3750, of certain land in the City of Toronto ; the other, a memorial of a similar indenture, dated and recorded on the same days, conveying to said Mercer certain other land in said City, in which the consideration was not mentioned.

Henry Van Allan Rapelje, Esquire, called in, and examined :

By Mr. *Chairman*.—What is your name and place of residence?—My name is Henry Van Allan Rapelje, and I reside at Simcoe, in the County of Norfolk.

Were you the sheriff of the County of Norfolk? If yes, when did you cease to hold that office?—I was sheriff of Norfolk. I resigned I think in the latter part of January, or first of February.

Do you know Lawrence Mercer, the present sheriff of Norfolk?—I do.

Did you before your resignation have any communication with the said Mercer relative to the Shrievalty of Norfolk ; state what that communication was?—I think directly from Mr. Mercer, I received one or two communications, but I received several communications from him through Colonel Wilson, Mr. Geoffry B. Hall, and I think others, with regard to the Shrievalty of Norfolk. Colonel Wilson, I think, spoke to me a year or two ago relative to appointing Mr. Mercer my deputy, and taking the office, and giving me a certain amount for it yearly. I found I could not do that with safety, as there was a statute against letting the office, and I declined. I had a great deal of trouble with my deputies, and was in ill health. Some time after, I had a proposal from Colonel Wilson as coming from Mr. Mercer, asking me what I would take for the office. I did not know what to say. I thought it was a novel sort of thing ; I took no notice of it. Some time after that, again, (during the latter part of the fall, I think,) I received a letter whilst at

Walsingham, from Colonel Wilson, saying that his brother (Mr. Mercer) was very anxious for an answer. I wrote Colonel Wilson, saying that I would take five thousand pounds—that being about £300 a year. Soon after I met Mr. Hall, who told me that he had received a communication from Mr. Mercer, saying that five thousand pounds was too much, but that he would give me £300 a year for the office during life. I asked Mr. Hall how that was to be done. Mr. Hall replied, that I would have nothing to do with getting the office for Mr. Mercer, as he (Mr. Mercer) would take upon himself all the responsibility of procuring the appointment. Nothing further took place till about the middle of January last, when I received a communication I think from Mr. Wilson—it may have been from Hall—requesting an answer to his last proposal. I wrote in reply, that if he (Mercer) would pay me £500 down, and secure me £300 a year during life, I would resign, I wish the committee to distinctly understand that I had nothing to do with Mr. Mercer's appointment. I further said in my letter that if he did not come to these terms he must drop the subject altogether. I got an answer immediately from Mr. Mercer; he said the amount was large, but he would see me in a few days. Very soon after a telegraph came to me from Mr. Mercer, desiring me to meet him in Simcoe on the following day. I did not do so. A day or two after that, Mr. Mercer came to Walsingham, where I was; he said he had got the thing all right; that he got Dr. Connor's opinion, which he produced, and wanted me at once to put my resignation in his hands. I laughed, and said "Mr. Mercer, you are very hasty, but this is a very serious matter to me, and I shall not do it until I am fully secured in the payment of £300 a year." He proposed that I should go to Simcoe. I declined, but said I would go to Toronto, as Mr. Galt was my counsel, and I wanted to see him. A few days after I came to Toronto—called on Mr. Galt, first alone, and afterwards with Mr. Mercer; told Mr. Galt all about the proposal, and consulted him as to how I was to be secured. Mr. Galt said I could be secured if Mr. Mercer had real estate. Mr. Mercer brought over his title deeds of property here in town. I have no doubt that the property mentioned in the memorials produced is the same. Mr. Galt drew up a memorandum in writing, which was signed by myself and Mr. Mercer, agreeing that as soon as I placed in Mr. Mercer's hands my resignation, I was to receive £500 in money, and be secured in £300 a year during life. Mr. Mercer was to run the risk of getting the appointment. I was to have nothing whatever

to do with the government, and whether he got the office or not I was to be secured in £300 a year, or to be replaced in my office by his handing back my resignation. After the signing I placed my resignation in Mr. Galt's hands, on the understanding that when the security was given Mr. Galt should hand the resignation to Mr. Mercer. I left town, and the whole matter was arranged by Mr. Galt. The necessary mortgages securing me in £300 a year for life were made out—I take this for granted from seeing the memorials. I have been paid £250 in cash on the £500, and hold Mr. Mercer's note for the balance of £500; part of the £250 I received then in town, and the other part after I returned to Simcoe.

Did you consider your transaction with Mr. Mercer to be a legal one, and did you take advice from legal gentlemen on the subject?—As to the legality of the transaction, I know nothing about it, consequently I came to consult Mr. Galt; at first Mr. Galt appeared to have doubts; he said he would require time to look into the case; after looking into it he said he thought the thing could be done; when Mercer came to Toronto we went to Mr. Galt's office together; we met Mr. Galt there; Mr. Mercer had a conversation with Mr. Galt in my presence with regard to the legality of the thing; Mr. Galt repeated over that he had doubts on the question; Mr. Mercer then produced Mr. Connor's opinion; Mr. Galt looked at it, and he told Mr. Mercer that at first he had doubts about the legality of the transaction, but he had come to the conclusion that the thing might be done.

Did you know at the time you made your arrangements with Mr. Mercer, that he was to be appointed in your place? Of course I could not know it; he was to run his own risk. Mercer gave me decidedly to understand that if he could get my resignation he would get the office; I remarked, "Now, if any thing should turn up that you should not get the office, it would be hard for you to pay me £300 a year." He said "you need not trouble yourself about that; I will pay you that any way," or something to that effect.

Were you given to understand, directly, or indirectly, by Mr. Mercer, that he had any communication with any member of the Government, or any other person, to the effect that he would get the appointment in case of your resignation; what were the grounds of his assurance that he would get it; did he not state them to you?—I think not, although he gave me to understand that he would be sure to get the appointment if I resigned; he did not state in so many words that he had made arrangements with the government,

though, of course, I inferred that he had, with some person; he did not, that I recollect, state the grounds of his assurance.

Was there any understanding or agreement between you and Mr. Mercer, that should Mr. Mercer not be appointed in your place, the deeds or documents above mentioned would not be signed?—If Mr. Mercer did not get the appointment, and if he would place me in my old position, then the agreement between himself and me was to be null and void as if it never had been made, but it was further agreed that if Mr. Mercer did not get the appointment, and I, in consequence of handing in my resignation, should lose the office, then I was to be secured in the £300 a year, just as if he had been appointed in my stead. The resignation was placed in Mr. Mercer's hands to be dealt with as he saw fit. I had nothing further to do with it.

How comes it that the deeds made to you by Mercer and his wife are absolute conveyances in fee simple, while the bargain between you was only for the purpose of securing you in a life annuity of £300 a year?—That was altogether left to my solicitor; I left the preparation of the titles in his hands. There is a memorandum in writing between Mr. Mercer and myself in my solicitor's hands; he will be enabled to explain the whole matter.

Lawrence William Mercer, Esquire, called in and examined.

When were you appointed sheriff of the County of Norfolk? I received a notification of my appointment on the 3rd or 4th of February last. The appointment appeared in the *Canada Gazette* about the 13th or 14th of March. The commission is dated the 10th of March.

Please state what took place between you and Mr. Rapelje about the office of Sheriff of the County of Norfolk?—Some time last autumn I was up shooting in Norfolk, and staying with Mr. Hall, my brother-in-law, when he first mentioned to me that Mr. Rapelje was tired of his office, and desirous to leave it; and as I was anxious to get to that part of the country where I formerly resided, I asked Mr. Hall, to ask Mr. Rapelje, the first time he saw him, if any arrangement could be made between him and me. A month or two afterwards Mr. Hall wrote me saying that he had seen Mr. Rapelje and mentioned the matter to him, and that Mr. Rapelje had said he would take £5,000 for the office, which would amount to £300 a year. I wrote back to Mr. Hall saying that I could not give any such sum as £5,000, but that I would give him £300 a year if he would resign. Mr. Hall on this saw Mr.

Rapelje, and wrote me saying that no doubt some arrangement could be made if I saw Mr. Rapelje. I then came to Toronto before seeing Mr. Rapelje, to enquire from my attorney if the thing could be done legally and properly, if I got the situation. After examination, he (Dr. Connor) gave me the opinion following :

"I am informed that the querist proposes to a sheriff to secure to him an annuity of a certain amount, secured upon real estate, provided the sheriff resign his office.

"The annuity is not to be conditional on the querist obtaining the appointment, but absolute, and the resigning sheriff is not to take any part in the appointment of, or suggesting the appointment of querist, or in any manner whatever to use his interest for the querist in the matter.

"I am of the opinion that the contract for the annuity would not be void or illegal on grounds of public policy or otherwise, but could be enforced."

"SKEFFINGTON CONNOR."

"Toronto, 19th January, 1858."

Before being thus assured that it could be done without any injury to Mr. Rapelje or myself, legally and properly, I went to ask Mr. Attorney-General Macdonald if I had any chance of getting the appointment of sheriff of Norfolk in the event of Mr. Rapelje's resigning. He (Mr. Macdonald) said he could not promise, as he had other parties to speak to, namely, his colleagues, but that my recommendations were strong for the first vacancy. I then went up and closed the matter with Mr. Rapelje. I have read the evidence of Mr. Rapelje, as given before the Committee, and corroborate distinctly all that he has said ; and I add—the deeds made by myself and Mrs. Mercer to Rapelje were not intended to be absolute, but to remain so only until Mr. Galt could get time to substitute for them other deeds securing Mr. Rapelje an annuity of £300 a year. Three months was the period given for this to be done in.

Did you understand from Mr. Rapelje or his friends before you commenced negotiations with him, that he desired to resign his office provided he could get a compensation for so doing ?—I understood both from Mr. Rapelje and his friends that he disliked the office, and was anxious to resign it if he could get a consideration for it.

Did you make formal application for the Shrievalty of Norfolk ?—I did.

Did Mr. Rapelje recommend you to Government for the office of Sheriff of the County of Norfolk ?—No.

Did you forward your application for the Shrievalty of

Norfolk to the Provincial Secretary in the usual way, and was it accompanied by any recommendations?—I handed in my formal application personally, with the resignation of Mr. Rapelje, to the office of the Provincial Secretary.

Thomas Galt, Esquire, called in and examined.

What is your name, profession, and place of residence?—

Thomas Galt. I reside at Toronto. I am a barrister at law, &c.

Were you the professional adviser of H. V. A. Rapelje, in the matter of the arrangement between himself and Mr. Lawrence W. Mercer, relative to the resignation of the former of the office of Sheriff of Norfolk?—I was. When Mr. Rapelje called upon me and informed me of the proposed arrangement with Mr. Mercer, I suggested to him that the positive sanction of the Government should be given to it, and that the Attorney-General should be made aware of it. He has stated in one of his answers that he wished to see the Attorney-General. I do not know why he did not. Mr. Mercer said he was in possession of the opinion of Dr. Connor, and shewed it to me. I said if he was satisfied I had nothing to say, but that in my opinion the agreement with Mr. Rapelje should be executed, not executory, and that, whatever arrangement they came to, it ought to be irrevocable, and not contingent on Mr. Mercer obtaining the office.

Did you state to Mr. Mercer as well as to Mr. Rapelje, what you say you stated to the latter?—I am not positive, but I am under the impression that I did.

Have you in your possession a memorandum of agreement, in writing, entered into between the said Rapelje and Mercer, relative to the said resignation? If yes, produce it.—I have, and I now produce it. Although the deeds are stated to have been executed, they were not actually signed until an hour or two afterwards.

“Memorandum of agreement made this 30th day of January, 1858, between Henry Van Allan Rapelje, of the town of Simcoe, Esquire, and Lawrence W. Mercer, of the town of Niagara, Esquire. Whereas the said Lawrence Mercer has this day conveyed to the said Henry Van Allan Rapelje certain lands in the City of Toronto, for the consideration of five thousand pounds, it is hereby agreed between the parties hereto, that the said Henry Van Allan Rapelje will, on the request of the said Lawrence Mercer, execute a re-conveyance of the said premises with a covenant against any incumbrance made by the said Rapelje, upon the said Mercer executing to the said Rapelje an assurance securing

to him, for the term of his natural life, the sum of three hundred pounds a year, payable quarterly, the payment of said annuity to be secured by mortgage and covenant to the satisfaction of the said Rapelje or his counsel, the said annuity to be redeemable at any time by the said Mercer, upon his paying the said Rapelje the sum of three thousand pounds.

"It is agreed between the parties hereto that in the event of the said Mercer returning to the said Rapelje the resignation signed by him, dated the 28th of January instant, of his office of Sheriff of the County of Norfolk, without any steps having been taken or anything done thereon, by which the said Rapelje shall or may be affected, and that the said Rapelje, notwithstanding his having signed such resignation, shall continue in his said office, then the said Rapelje shall and will make a re-conveyance of the said lands, and shall and will repay to the said Mercer the sum of five hundred pounds this day paid by the said Mercer to him, it being the intention of the parties hereto, that in the event of the said Rapelje continuing to hold his office as event of the said Rapelje continuing to hold his office as Sheriff of the County of Norfolk, the said lands shall be re-conveyed, and the said money repaid, and each and every stipulation and agreement herein contained, and any thing done therein by either party, shall cease and determine.

"It is agreed that the option of the said Mercer to obtain a re-conveyance of said lands by granting the annuity as before mentioned shall be exercised within three months from this date, unless the time shall be further extended by both parties."

"H. V. A. RAPELJE.

"LAW. W. MERCER.

"Witness, Thomas Galt."

Cameron, Q. C., for the defendant. As to the proceeding by *sci. fa.*, that does not lie against defendant in reference to this office, because the patent expressly declares that it is an office to be held during pleasure, and therefore, as the crown can put an end to it at once, there is no necessity for a *sci. fa.* In *Aston v. Gwinnell*, 3 Y. & J., 136, a reference is made to the difference between an office held for a particular period and during pleasure ; and though it may be said that it is better the Crown should be informed as to the facts, yet this is not the proper way to obtain such information. The information should first be prosecuted to

conviction, and if they proceed by *sci. fa.* at all it should only be after the information. [*Robinson, C. J.*—But nothing is said in the record as to the information, and we cannot notice that there is such a proceeding.] It should appear on the record that the facts necessary to vacate the office have been found.

As to the general question, the statutes to be considered are the 5 & 6 Ed. VI., ch. 16, and 49 Geo. III., ch. 126. It is contended for defendant—1: That the statute of Ed. VI. is not in force in this country, but is a law of internal arrangement and police only, as is shewn from the several persons spoken of, and the things contained in it, to which it could have no application here—*Blankard v. Galdy*, 2 Salk. 411; *Daws v. Sir Paul Pindar*, 2 Mod. 45; *Rex v. Vaughan*, 4 Bur. 2494; *Daws v. Paynter*, 3 Keb. 26. Our statute, 32 Geo. III., ch. 1, sec. 3, introduces the law of England only “in all matters of controversy relative to property and civil rights,” an expression which will not include the enactments in question.

2. If the statute is to be considered as in force, this case is not within it, for by it only a bargain and sale of an office is made an offence, and there can be no bargain and sale of an office directly in the gift of the Crown, as this is; no case can be found as to the bargain and sale of such an office. In *Chitty's Statutes*, 740, a large number of cases are collected as to the bargain and sale of offices, but none of them relate to offices directly within the gift of the crown. Moreover, the evidence here does not shew a bargain and sale; and the mere getting a man to resign an office is no offence within that statute. If A. resigns with the express intent that B. shall be appointed, it may perhaps be different, but here the party resigning had nothing to do with the other getting the office. He did resign so that the other might endeavour to obtain it, but that is not a bargain and sale: a bargain and sale is not made merely by the fact that one agrees to resign, but the other must get the office in consequence of the resignation. If the case does not come within this act as a bargain and sale, it cannot be a bargain and sale at common law, and the 49 Geo. III., ch. 126, must therefore be relied upon for the prosecution. If applicable, it must be admitted that the

evidence brings this case within this statute, but notwithstanding the case of *Foott v. Bullock*, 4 U. C. R. 480, it is submitted that the act does not apply. If applicable at all in this country, it could only be to the Governor-General, or to officers of state in colonies, similar to those mentioned in the act, not to the office of sheriff, 6 Moore, 38.

R. A. Harrison, contra. As to the proceeding by *sci. fa.*, it does not follow that because the Crown *may* revoke the commission without applying to the court, the Crown cannot come to this court and obtain a judicial decision in a doubtful case, if that course be preferred to acting summarily.

An actual bargain and sale is not essential to bring the case within the statute of Ed. VI.; Co. Lit. 234, 120 a 3; *Huggings v. Bambridge*, Willes 241. The act extends to the office of sheriff, which is certainly one relating to the administration and execution of justice; and is in force in this country, being introduced by the 32 Geo. III., ch. 1. The sixth section of the last mentioned statute provides in effect that certain laws shall not be introduced, and the fact of this branch of the law not being mentioned there, shews that it was not intended to be excluded. But if any doubt could exist as to this case being within the statute of Ed. VI., there can be no question that it comes under the 49 Geo. III. A clearer case within the third section cannot exist.—*Regina v. Charretie*, 13 Q. B. 447; and the case of *Foott v. Bullock*, 4 U. C. R., 480, is in point to shew that that statute is in force here, and applies to the office of sheriff.

Independently, however, of either act, the evidence shews an offence at common law. The policy of the law is to secure the employment of proper persons, and that no one shall purchase appointments, because the practice offers inducements to oppression and extortion, inasmuch as whoever buys will try to make out of his bargain a good return for his outlay.—Hawk P. C. I., ch. 67, sec. 3; Bac. Abr. "Offices," F.; Ch. Com. L. III. 98; Ch. Crim. L. 681, c; *Layng v. Paine*, Willes 574; *Russell C. & M.*, Vol. I., 147; *Rex v. Pollman*, 2 Camp. 229; Law v.

Law, 3 P. Wms. 391 ; Richardson v. Millish, 2 Bing. 229. The payment to Rapelje was bribery at common law. By the agreement the government would in effect be giving Rapelje £300 a year out of defendant's fees, which, had they known the facts, they never would have done. Suppose Rapelje were to sue for his annuity, there is no consideration in law, and he could not recover.—Blachford v. Preston, 8 T. R. 89 ; Parsons v. Thompson, 1 H. Bl. 322 ; Hopkins v. Prescott, 4 C. B. 578 ; Waldo v. Martin, 6 D. & R. 346.

It is submitted, therefore, that the transaction proved here is illegal, both under the statute of Ed. VI., and of Geo. III., and at common law.

ROBINSON, C.J.—This is an information under the statute 5 & 6 Ed. VI., ch. 16, against the sale of offices. The defendant is charged with having corruptly, and contrary to the statute, agreed with Henry Van Allan Rapelje, then holding the office of sheriff of the County of Norfolk, to pay him £500, and to secure to him an annual payment of £300 during his life, on condition that he would resign the office of sheriff, to the intent that the defendant Mercer might be appointed to the same, and the information avers that in pursuance of that agreement Rapelje did, on the 28th of January, 1858, at the request of the defendant, surrender and resign his office of sheriff, with the intent and purpose that the defendant should be appointed to the said office : that his resignation was duly accepted by Her Majesty on the 2nd of February, 1858 ; and that the defendant was afterwards, to wit, on the 2nd of February, 1858, appointed by Her Majesty to the said office, without knowledge of the said unlawful agreement between Rapelje and the defendant ; and this is charged in the information as being against the form of the statute, to the evil example of others in like case offending, and against the peace of the Queen, her crown and dignity.

There are six counts in the information, in all of which the transaction is stated in substantially the same manner, but with variations, it being averred in some of the counts that the office was one in the gift of the Crown ; that it

concerned the execution of justice ; that it was part of the agreement with Rapelje should procure the defendant to be appointed at the office : that he did procure him to be appointed ; and that the agreement between the parties was in fraud of Her Majesty.

The information does not charge a forfeiture of the office by the defendant, but concludes by merely praying that the defendant may be brought in to answer, &c.

The defendant pleaded not guilty.

The Attorney-General, on the one side, and the defendant by his counsel, on the other, have submitted to us the pleadings, together with certain printed statements which are admitted to be correct, and which include an account of the transaction given by the defendant himself ; and they desire the court to determine upon the pleadings, and admitted facts so brought before them, "whether the defendant has acted in any manner contrary to law."

The case was argued before us chiefly in reference to the statutes 5 & 6 Ed. VI., ch. 16, and 49 Geo. III., ch. 126, though it was not conceded that what is charged in this information would not have been an offence at common law.

The two earliest statutes passed with a view to secure appointments to public offices being made upon proper grounds, are the 12 Rich. II., ch. 2, and 2 Hen. VI., ch. 10. The former of these was passed nearly five hundred years ago, and whatever measure of success may have attended it, it certainly was an effort to ensure purity of conduct in making appointments to office that may put to shame the legislation of all modern times, for it requires the chancellor, treasurer, justices of the one bench and of the other, and all others that shall be called to name or make justices of the peace, sheriffs, or any other officer or minister of the King, to take a solemn oath "that they shall not ordain, name, or make justice of peace, sheriff, nor other officer or minister of the King, for any gift, or brocage, favour or affection ; nor that none which pursueth by him, or by other, privily or openly, to be in any manner of office, *shall be put in the same office or in any other* ; but that they make all such officers and ministers of the best and

most lawful men, and sufficient to their estimation and knowledge."

The statute 2 Hen. VI., ch. 10, is to the same effect. Both statutes relate, not to appointments made by the Sovereign, but to inferior offices, to which certain great officers of state had the power of appointing; and it is remarkable that the first of them went so far as to prohibit the bestowing of an office upon any one who should solicit it. Neither of these statutes, however, it is plain, apply to the present case.

The statute passed nearly two hundred years afterwards, 5 & 6 Ed. VI., ch. 16, and the modern statute 49 Geo. III., ch. 126, reciting and extending its provisions, are those which alone it is material to consider. The statute 5 & 6 Ed. VI., ch. 16, "Against buying and selling of offices," is very carefully framed, and is minute and comprehensive in its provisions. It is stated in the preamble to be passed "for the avoiding of corruption which may hereafter happen to be in the officers and ministers in those courts, places or rooms, wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced to the place where justice is to be ministered, or any service of trust executed, should hereafter be preferred to the same, and no other." It enacts that if any person shall "*bargain or sell any office, or receive, have or take any money, fee, reward, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, fee, reward, or other profit, directly or indirectly, for any office or offices; or to the intent that any person should have, exercise or enjoy any office or offices, which office or offices shall in any wise touch or concern the administration or execution of justice, or the receipt or control of the King's treasure, &c., (enumerating many offices, and among them any clerkship to be occupied in any court of record wherein justice is to be administered,) that then every person which shall bargain or sell any of the said offices, or that shall take any money, fee, or reward for any of the said offices, or that shall take any promise, covenant, bond, or assurance for any money, reward or profit, to*

be given for any of the said offices, shall not only lose and forfeit all his right, interest or estate, which he shall then have in or to the said offices, for which any such person shall so make any bargain, or sale, or take or receive any money, reward, &c., or any promise, covenant, or assurance to have or receive any fee, reward, money or profit; but also, that all and every such person or persons that shall give or pay any sum of money, &c., or shall make any promise, agreement, bond or assurance for any of the said offices, &c., shall immediately by and upon the same fee, money, or reward given or paid, or upon any such promise, covenant, bond, or agreement had or made for any fee, sum of money or reward to be paid as aforesaid," (that is among other things, to be paid *to the intent that the person so paying shall have, exercise, or enjoy any office*), "be adjudged a disabled person in the law to all intents and purposes to have, occupy or enjoy the said office, or offices, &c., for the which such person shall so give or pay any sum of money, fee, or reward, or make any promise, covenant, bond, or other assurance to give any sum of money, fee or reward." The next clause makes void all promises, covenants, assurances, &c., which may have been given for carrying into effect any agreement such as is prohibited by this act.

It is plain that the office of sheriff is one of those to which this statute extends, as being an office touching and concerning the administration and execution of justice. But it is denied that this statute has any force in Upper Canada. If that point depended merely on the question whether it is included in our adoption of the law of England under our statute, 32 Geo. III., ch. 1, (the first statute passed in Upper Canada,) which provides "that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same," a good deal might be urged against the application of the statute, not because it is obsolete, for it has been by no means so regarded in England at any time; but because it may be insisted that the words "all controversies relative to property or civil rights," have a more confined signification, and extend only to controversies which are to be determined

upon the principles governing questions of *meum* and *tuum*, and regarding the personal rights and capacities of parties, independant of considerations of public policy. On the other hand, it might be contended, I will not say how reasonably, that "civil rights" may fairly be taken to include the right of a person to buy or sell a public office, and that when a question arises here respecting the right of a public officer to sell his office, or the right of another to buy it, or the right to enforce by law any contract that may have been entered into for such a purpose, such a question becomes a controversy relative to a civil right, and that resort must be had to the law of England for determining it. If the latter conclusion be a sound one, then the statute 5 & 6 Ed. VI., ch. 16, would be in force here, as having been introduced by our statute just referred to, 32 Geo. III., ch. 1. I will only say at present on that point, that before I could so determine I should desire to have that question more fully discussed than it was thought necessary to discuss it upon the argument of this case.

It is more to the purpose, I think, to consider whether the 5 & 6 Ed. VI., ch. 16, should not be held to be in force here under our adoption of the criminal law of England by 40 Geo. III., ch. 1, which enacted that the *criminal law of England* as it stood on the 17th of September, 1792, shall be, and it was thereby declared to be the criminal law of Upper Canada. I think it must be held that the statute 5 & 6 Ed. VI., formed part of the criminal law of England which was thus introduced. It was passed to prevent mal-practices in obtaining and disposing of offices of public trust. There would be strong ground for contending that what was done in this case would be an offence at common law, supposing no statute had been passed to prohibit it, though it is not exactly a case of the same nature as Vaughan's case (4 Burr. 2494), which was cited by Mr. Harrison in the argument; but when parliament had made it unlawful to buy and sell offices, or to make bargains with that view, and punished the act by disabling the offender to hold the office, I cannot say I feel any doubt that any act done in direct contravention of the statute became an indictable offence, if it were not before an offence at common law, for the statute was made for restraining a

great public evil, equally necessary and proper to be restrained in all countries, more especially as regards those offices which are connected with the administration of justice. In *Woodward v. Fox* (2 Ventris 267), an office of registrar in an archdeacon's court had been sold by the archdeacon for £100. It was considered to be an offence within this statute 5 & 6 Ed. VI., and the bishop, taking the appointment, to be void by reason of the statute, claimed a right to appoint another, but the Crown, in disregard of that appointment gave the office to another, and it was held that the right of appointment in consequence of the forfeiture vested in the Crown, though under other circumstances the Crown could not have appointed; and the judgment was founded upon the principle that it was the case of a forfeiture for an offence, and must follow the general principle in such cases, that the forfeiture is to the Crown, unless where it is otherwise provided by statute. The court, in referring to the statute, say that this is a statute for avoiding corruption in offices and abuse in the administration of justice: that in all crimes of a public nature the King is most evidently injured by them; that the indictments run *contra coronam et dignitatem*, and who should have the forfeiture but he who has the greatest share in the injury? "We are in the case of a forfeiture," the court observed, "for offending against an act of parliament."

This is treating the statute as one creating an offence of a general and public nature, and as forming therefore a part of the criminal law, and I have no doubt that we must so regard it, and that it does consequently form part of the criminal law of England adopted by us (as it stood in 1792), by our statute 40 Geo. III. Either under the head of bribery or sale of offices, the provisions of the 5 & 6 Ed. VI., ch. 16, are treated as forming part of the criminal law of England, by writers ancient and modern, as by lord Coke in his third Institute, page 148, by Sergeant Hawkins, by Russell in his Treatise on Criminal Law, and by Mr. Chitty, from whose second volume of Precedents in the Criminal Law the form of this information is taken.

But if this were not so clear as I take it to be, still it is

to be considered that the British statute 49 Geo. III., ch. 126, expressly extends the provisions of 5 & 6 Ed. VI., ch. 16, to the colonies, or at least such of its provisions as are in their nature applicable. The enactment at the end of the first clause of that act has clearly that effect, I think, though it is not so clearly expressed as it might be. It provides that the 5 & 6 Ed. VI., ch. 16, shall extend to Scotland and Ireland, and to all offices in the gift of the Crown, or of any office appointed by the Crown, and to all commissions, places, and employments *under the appointment or superintendence and control* of the Lord High Treasurer, &c., (enumerating many high officers, and among them the Secretary of State,) "and also the principal officers of any other public department or office of His Majesty's government in any part of the United Kingdom, *or in any part of His Majesty's dominions, colonies or plantations, &c.*, and also "to all offices, commissions, places, and employments belonging to or under the control of the East India Company, in as full and ample a manner as if the provisions of the said act were repeated as to all such offices, &c., and made part of this act."

The office of sheriff in this province is an office concerning the administration of justice in the gift of the Crown, to which the appointment is made by letters patent under the great seal of this province, issued by the Governor of the province in Her Majesty's name; and if it be not under "the appointment, superintendence and control" *of the Secretary of State* (legally speaking), it certainly is an office under the appointment *of the principal officer of Her Majesty in this part of Her dominions, namely, the Governor of the province.* The 5th and 6th Ed. VI., is therefore by this act, I think, expressly made to extend to the office now in question.

But whether we take the statute 5 & 6 Ed. VI., to be in force in this province under our own legislative adoption of the criminal law of England, or by force of the statute 49 Geo. III., ch. 126, it remains still to be considered whether the offence charged in this information is within that act. I think the statute 5 & 6 Ed. VI., does make it illegal to do what the defendant in this case did, namely, to

give money, or to contract to give money or other reward to one holding such an office as is within the act, in order to induce him to resign the office, and to the intent that the person paying the money may obtain the office. The defendant agreed to pay money to Rapelje to the intent that he, the defendant, should have and enjoy the office of sheriff which Rapelje then held. It is true that Rapelje could not give him the office, or assure it to him, but nevertheless he sold out to the defendant, and the defendant bought him out, to the intent that the defendant might have and receive the office by appointment from the Crown. The defendant, it is evident by his own account of the matter, and by Rapelje's statement, which he has declared to be correct, had ascertained that if the office were vacant he could obtain it, being, as we have no doubt he was, a person well qualified to discharge the duties of the office, and one whom the government was on that account well inclined to appoint.

The reservation made by the defendant, that he was not to pay the money until he was sure of getting the office from the government, does not make the statute apply the less clearly, but rather the more, because, when the defendant had ascertained that he would be appointed to the office if the other should resign it, he was then more certainly and literally giving the money or reward *to the intent that he should have, exercise, and enjoy the office,*" without the qualification of any condition. and was in effect buying the office from Rapelje after every thing else had been ascertained and settled.

But, secondly, if that point were not clear under the statute 5 Ed. VI., when taken alone, as I think it is, then we have to consider the more modern act 49 Geo. III., ch. 126, the object of which, as I have stated, was to make the 5 Ed. VI. more comprehensive in its provisions, and to extend its operation to offices in the colonies more immediately in the gifts of the heads of certain departments of the state than of the king himself. In the third and fourth clauses of that act, the very case of a reward paid to a public officer for his resignation is in express terms provided against, so that if the 5 & 6 Ed. VI., ch. 16, does not so clearly

include such a transaction as this was, this statute removes all doubt on the point ; and the first clause of 49 Geo. III., ch. 126, in positive terms declares and enacts, that the said act (of 5 & 6 Ed. VI., ch. 16) and this act (49 Geo. III., ch. 126) and all the clauses and provisions therein respectively contained, shall be construed as one act, as if the same had been in the 49 Geo. III., repeated and re-enacted.

The effect of this provision is, that we must read what is said in 49 Geo. III. about purchasing a resignation of office as if it had formed a part of 5 & 6 Ed. VI., ch. 16, and we must apply it to any of the offices in the colony to which that act applies, now that it has been made to extend to the colonial possessions of the Crown.

On the whole, my opinion is, that the statute 5 & 6 Ed. VI., ch. 16, is in force in this province as part of the criminal law of England, which we have adopted. And taking this case upon that act alone, I think we should be bound to hold that what was done by the defendant was illegal, as being in fact a purchase of the office ; but more clearly illegal, as being within the very words of that part of the statute which prohibits money or reward being taken or given, or any covenant or assurance being made, to the intent that any person shall have, exercise, or enjoy any of the offices referred to in the act. I refer on this point to *Huggins v. Bambridge* (Willes 246, 248), and to Co. Lit. 234, 3 Inst. 154, which are indeed express decisions to that effect, and the case of Sir Arthur Ingram was precisely like the present. The case of *Huggins v. Bambridge* was in fact the same in principle and effect, as the court held, though there was this additional circumstance in it, which did not form a part of Ingram's case, and does not form a part of the case now under our consideration : namely, that in *Huggins v. Bambridge*, the former holder of the office stipulated to procure the other to be appointed, and did procure the appointment for him. The court, however, held that without that circumstance the case would have been equally within the statute. An action had been brought on the bond given to Vernon to procure him to resign, and it was objected that the case was within the statute 5 & 6 Ed. VI., and the bond therefore void.

Lord Chief Justice Willes, in giving judgment in *Huggins v. Bambridge*, thus states the case of Sir Arthur Ingram, "That was the case of the Cofferer of the King's House, of which Sir Robert Vernon was possessed by grant from the Crown, who agreed with Sir A. Ingram for a sum of money to surrender his office to the king, to the intent that the king might grant it to Sir Arthur Ingram, which was done accordingly. The case was referred to the Chancellor and several of the justices, who unanimously determined that that case was within the statute of Ed. VI.; and Sir A. Ingram lost his office; and they held that all promises, bonds, and assurances, given for those purposes were made void by the act. And this is a case" (his lordship said) "very like the present, only the present is a little stronger; here being not only an *intent*, but a procurement expressly alleged and confessed." The office there in question was that of warden or keeper of the Fleet prison. In concluding his judgment the Chief Justice observed, "It is admitted that this office touches and concerns the execution of justice; it is expressly alleged that it was agreed between the plaintiff and the defendant that the bond in question should be given as a consideration that the plaintiff and his son should surrender their interest and estate in this office, for the intent and purpose that the plaintiff should procure a grant of the same to be made to the defendant for his life: that this bond was accordingly given for the consideration aforesaid: that the plaintiff and his son surrendered their estate and interest in the office according to their agreement: that the office thereupon was granted to the defendant; and that such grant was made to him by the procurement of the plaintiff, and according to the said corrupt agreement; and all this is confessed by the plaintiff's demurrer. *If the office had been only surrendered by the plaintiff to the defendant upon the intent that the defendant might have the office, and the plea had said nothing more, it had been within the express words of the statute, and the case of Sir A. Ingram before mentioned, which goes no further, is an express authority in point to this purpose.* But the present case goes farther, and it is alleged also that the plaintiff was to

procure a grant of the office to the defendant, and that he did procure it accordingly, so that I think there can be no doubt but he has brought his case within the express words of the statute." This applies very closely to the case before us; and besides this, the statute 49 Geo. III., ch. 126, which had not then been passed, makes provision in terms against purchasing the resignation of an office; and parliament having directed that that statute and 5 & 6 Ed. VI., ch. 16, shall be read together as one act, and that both shall extend to offices in the colonies, I do not see how it can be doubted that what is charged in this information was illegal. It would have been illegal, I think, in this province, under the 5 & 6 Ed. VI. alone, after we had adopted the English criminal law by our statute, 40 Geo. III., ch. 1, if no such British statute as 49 Geo. III., ch. 126, had been passed, which latter act, however, it appears to me removes all question.

In the case of *Foott v. Bullock* (4 U. C. R. 480) we had occasion to consider the statutes 5 & 6 Ed. VI., ch. 18, and 49 Geo. III., ch. 126; but the question in that case arose upon a matter for which provision is not made by the former of those statutes, but only by the latter, which provisions contained in the latter were held to be in force in the colonies, being made to extend to them, as we considered, by the express language of the act; so that we have in fact determined in this court in *Foott v. Bullock*, the statute 49 Geo. III. to be in force in this province; and as that act does provide expressly for a case like the present, of purchasing from another the resignation or surrender of the office, we have in effect already determined in that case, that what has been done in the present case was illegal.

I will only add that the law which prohibits bargains of the kind we have been now considering is supported by the strongest and most obvious considerations of morality and public policy. Both parties appear from what is before us to have had a misgiving at first that the transaction they were engaged in was one of a questionable character. It goes far, however, to relieve the defendant from the imputation of committing what he knew to be an offence, that he

was advised by counsel that what he proposed to do was not unlawful, though we cannot allow that consideration to influence our judgment on the legal question submitted to us.

In several of the counts it is alleged that the office of sheriff was conferred upon the defendant by the Queen in ignorance of the arrangement which had taken place between him and Mr. Rapelje. If that were clearly shewn to be the fact as regards any knowledge of the government, as no doubt it is, so far as her Majesty is concerned, it would make the act itself neither more or less a violation of the statute than if all the circumstances had been fully made known to the government. This is, therefore, I think, a wholly immaterial averment, though of course it would be otherwise, if, in order to prove the offence against the statute, it had been necessary to shew that the government had been deceived and imposed upon.

In my opinion, therefore, there should be judgment for the Crown upon this information.

MCLEAN, J.—The substantial question agreed upon for the opinion of the court is, whether under the facts stated the defendant has acted in any manner contrary to law?

If the court are of opinion in the affirmative, then judgment is to be entered for the Queen.

There is no provincial enactment under which the information in this cause could be filed, but at common law I have no doubt it could be sustained. The cases cited on the argument establish, I think, very conclusively that an indictment or information will lie in such a case, on the ground that public policy requires that there should be no money consideration for the appointment to an office in which the public are interested, and that the public will be better served by having persons best qualified to fill offices appointed to them; but that if money may be given to those who appoint, or through whom an office may be obtained, it may be a temptation to appoint improper persons. But besides the remedy at common law, there are statutory provisions, which have been introduced from the laws of Eng-

land by the act of the legislature of Upper Canada, 40 Geo. III., ch. 1, or which have since been passed by the imperial parliament, and declared to extend to the British dominions, colonies, and plantations in America, which make express provision for cases similar to the present. Under the provincial act referred to, passed in 1800, it is provided that the criminal law of England, as it stood on the 17th day of September, 1792, shall be the criminal law of this province ; and, as a part of that criminal law, the act 5 & 6 Ed. VI., against buying and selling of offices was undoubtedly introduced, declaring it to be a misdemeanor to buy or sell any office which shall *in any wise touch or concern the administration or the execution of justice*, to the intent that the purchaser shall have, exercise, or enjoy the same. But if there could be any doubt on that head the imperial act, 49 Geo. III., ch. 126, passed on the 20th of June, 1809, "for the further prevention of the sale and brokerage of offices," adopts and incorporates all the provisions of 5 & 6 Ed. VI., and declares the same to be made part of that act, and that all the clauses and provisions therein respectively contained shall be construed as one act ; and by its express provisions this act extends to the British dominions, colonies, and plantations in America, and to all offices in the gift of the Crown, or any officer appointed by the Crown, and all commissions, civil, naval or military, and to all places and employments in the respective departments or offices, or *under the appointment or superintendence and control* of the Lord High Treasurer, or Commissioners of the Treasury, the Secretary of State (and various other officers and departments enumerated), and also the *principal officers* of any other public department or office of His Majesty's government in any part of the United Kingdom, *or in any of His Majesty's dominions, colonies, or plantations, then belonging or which might thereafter belong to His Majesty.*

By the 15th section it is provided that the act shall not come into force in any of His Majesty's dominions, colonies, or plantations in America or the West Indies, *until four months after the passing thereof*. This statute, then, applies to all offices in the gift of the Crown or appointed by

the Crown, and to all places and employments in the public departments in England, Scotland, and Ireland, or offices under their appointment, superintendence, and control, or under the *appointment, superintendence, and control of the principal officers of His Majesty's dominions, colonies, or plantations in America*. It will be admitted that the Governor-General of British North America, presiding in and exercising the powers of Governor in Canada, has, by the royal prerogative, the authority to appoint to the office of sheriff, and to superintend and control that appointment, and under that authority the defendant has been appointed on the resignation of Henry Van Allen Rapelje, his predecessor. The office is clearly one touching and concerning the administration and execution of justice, and one of those offices the buying or selling, *or resignation* of which, for the intent that another may be appointed, is prohibited and declared to be a misdemeanor by the statute.

The third section of 49 Geo. III., ch. 126, is amazingly particular. It declares that if any person or persons shall, after the passing of that act, "sell or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond or assurance, or shall by any way, device or means, contract or agree to receive, or have any money, fee, gratuity, loan of money, reward or profit, directly or indirectly; and also if any person or persons shall purchase or bargain for the purchase of, or give or pay any money, fee, gratuity, loan of money, reward or profit, or make or enter into any promise, agreement, covenant, contract, bond or assurance, to give or pay any money, fee, gratuity, loan of money, reward or profit, or shall by any way, means or device, contract or agree to give or pay any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, for any office, commission, place or employment specified or described in the said recited act" (5 & 6 Ed. VI., ch. 16) "or this act, or within the true intent and meaning of the said act or this act, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or

nomination thereto, *or* *resignation* thereof, or for the consent or consents, or voice or voices of any person or persons to any such appointment, nomination or *resignation*, then, and in every such case, every such person, and also every person who shall *wilfully* and *knowingly* aid, abet, or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor." It would be difficult to point out any enactment embracing a greater anxiety to guard against a particular offence ; and the view which the imperial parliament took of the magnitude of the evil of buying and selling public offices is, I think, very apparent from the measure adopted to suppress it throughout the British dominions.

On the argument of this case by the defendant's counsel, it was admitted that if the act referred to is in force in this province the evidence is sufficient to bring the defendant within its provisions, and undoubtedly it is so. The act then having been declared to be in force in the case of *Foott v. Bullock* (4 U. C. R. 480,) and the judgment in that case being now adhered to and confirmed, no other conclusion can be arrived at but that the defendant must be adjudged guilty of misdemeanor charged against him, and that judgment must be entered for the Crown.

The judgment on the information filed against the defendant in this case is of course conclusive in the proceeding by *scire facias* to repeal the patent granting the office of sheriff of the County of Norfolk to the defendant. By the statute the agreement between defendant and the late sheriff is void, and the defendant is rendered incapable of holding or filling the office, so that the patent can confer no right to hold it, and must be repealed.

In the arrangements which have lead to such unfortunate results to all parties concerned, it is manifest from the evidence, and it is gratifying to find, that they were not acting wilfully and knowingly in violation of the law, as the course they pursued was sanctioned by the advice of professional men of considerable eminence, who seem to have overlooked the provisions of the statute. The court, however, in discharging its duty is not at liberty to pay attention to the consequence arising to parties from an infringement of the positive enactments of a statute.

BURNS, J.—The two modes in which the questions for decision are presented to the court, are adopted, as I understand, by agreement, for the purpose of obtaining the opinion of the court without reference to technicalities.

The first is that of *scire facias* to annul the letters patent and commission under the great seal to the defendant as sheriff of the County of Norfolk. This proceeding is brought under the recent statute 22 Vic., ch. 97. The defendant has demurred to the writ, upon the ground that the statute 5 & 6 Ed. VI., ch. 16, is not in force in Upper Canada, neither is the statute 49 Geo. III., ch., 126, and that if the latter statute shall be considered as in force here, then the writ of *scire facias* does not disclose facts to bring the case within that statute. I shall reserve what remarks I have to make upon these statutes being in force here until I treat the case upon the information, and at present confine myself to the language of the writ, and what is set forth and admitted by the demurrer. It is alleged that Mr. Rapelje, the late sheriff, agreed he should, in consideration of the unlawful agreement stated, surrender, relinquish, and resign his office to the Queen in favour of the defendant, to the intent and purpose that he, the defendant, should be appointed by the Queen to the said office. The agreement between Mr. Rapelje and the defendant is then stated and alleged. The first question is, whether these facts, admitted as they are, and assuming the statute of Edward to be in force, bring the case within its terms so as to pronounce the defendant to be a disabled person to have, occupy, and enjoy the said office. The statute enacts that if any person shall take any money or reward for bargaining or selling his office, or if he shall do so to the intent that any person should have or enjoy the office, then that he shall forfeit his office, and all gifts, promises, &c., shall be void; and further, it enacts, covering this case, that if any person shall give or pay any money or reward for *any of the said offices*, he shall immediately, by and upon the money being paid or given, be adjudged a disabled person to hold the office. It is admitted that the defendant paid Mr. Rapelje a sum of money, and gave security to pay him an annuity, for sur-

rendering, relinquishing, and resigning his office. It is argued that this, though true, does not establish that Mr. Rapelje bargained or sold his office to the defendant. Admit that to be so, the statute is not confined to making it necessary that a bargain and sale of the office should be completed, but it is wider, and says, if any person shall take, or if any person shall give, any money to the intent that any person may have, exercise, or enjoy an office. The charge here is, that Mr. Rapelje should surrender *in favour* of the defendant to the intent that the defendant might have the office. Suppose we were to allow this admission to be struck out as being too strong, as it was said in the argument, for that Mr. Rapelje would most certainly resist the imputation of having surrendered or resigned his office in favour of any one, and the defendant repudiated the idea that he was making a bargain not authorized by law, and if we should take it that the defendant paid Mr. Rapelje a sum of money and secured an annuity to him, to the intent that the defendant might have and enjoy the office, then the case would still be within the meaning of the act.

Secondly, as to the 49 Geo. III., ch. 126, supposing that statute to be in force here, and if we strike out all about the resignation of Mr. Rapelje *in favour* of the defendant, and simply place the matter upon the footing of the defendant paying the money, &c., that Mr. Rapelje should resign his office, then the case would be within the meaning of the fourth section of the act; and with regard to the defendant being held in that case a person disabled from having or enjoying the said office, we see that the latter enacts that all the clauses of the statute of Edward shall be taken to be as if re-enacted in the other, and the two acts shall be read as one act. *Huggins v. Bambridge* (Willes 241.)

The second mode adopted by the Crown is that of an information against the defendant, treating him as guilty of an offence, and this is presented to the court in six counts, varying the charge to meet the evidence and facts, which are laid before the court in the shape of a special case.

It is quite clear from abundance of authority that where-ever an indictment will lie for a misdemeanor, an information

may also be sustained, and the cases reported upon the subject of offences which concern public justice shew that the proceeding to obtain punishment is perhaps as frequent by the one mode as by the other. Suppose that to be so, then it is urged for the defendant that he has committed no offence, and that the statutes 5 & 6 Ed. VI., ch. 16, and 49 Geo. III., ch. 126, are not in force in Upper Canada, or at least so far as regards the office of sheriff.

1. As respects the statute 5 & 6 Ed. VI., ch. 16, several cases were cited, and they established that this statute by operation of itself was not considered to be in force in the colonies, and another case may be added to those to shew that it was not in force in Ireland, not being enacted there. *Macarty v. Wickford* (Bac. Abr. Offices and Officers F.) If we were to accede to that argument, I still should say, that upon the facts disclosed in this case an indictment or information might be sustained at common law.—1 Russell on Crimes 147; *Rex v. Pollman* (2 Camp. 229). It is said upon high authority that the sale or purchase of public offices is highly criminal at common law, for nothing can be more disadvantageous to the welfare of the state than that its higher capacities should be filled, not by those who are most able to discharge them, but those who can pay most to obtain them, and it is equally a crime to give as to receive. I do not, however, entertain a doubt that the statute of Edward is in force in this part of the province by reason of our introduction of the criminal law of England as it stood on the 17th of September, 1792, and that fact renders the decisions in England inapplicable here so far as they decided the act itself not to be in force; but those cases, such as *Blankard v. Galdy* (4 Mod. 222, 2 Salk. 411) relating to the office of Provost-Marshal of Jamaica, and those relating to the office of clerk of the peace, warden of the Fleet, collectors of customs, are very important, shewing to what offices we may in this country apply the statute. The first clause prohibits any person from taking or receiving any money, &c., for bargaining and selling any office or offices, and also from taking or receiving the same, to the intent that any person should have, exercise, or enjoy any office or offices which shall in

any wise touch or concern the administration or execution of justice. Now, although Mr. Rapelje might possibly succeed in convincing a jury that he did not bargain or sell his office, yet I think it impossible to say that he did not take and receive the money and securities to the intent that the defendant might have and enjoy the office of sheriff. Then the clause goes on to say that every person who shall give or pay any sum of money, &c., shall be adjudged a disabled person in the law to all intents and purposes, to have, occupy, or enjoy the said office. Here we have as strong a prohibitory statute as language can make it, and it only remains to be seen whether the contravention of it amounts to an offence for which an indictment could be sustained.

The only reason which could be urged against the matter being treated as an offence is that the statute is silent as to whether the contravention of it shall be considered to be a misdemeanor, and there are penalties imposed that all such bargains, sales, securities, &c., shall be void. It is not necessary, when an act of parliament prohibits a thing being done, to annex to it in all cases words shewing that the intention was to make it an indictable offence if the statute be violated. If an act of parliament prohibits a thing being done under some specific penalty, then that penalty is all that can be enforced, but if, in a different part of the act, certain consequences are entailed upon the act prohibited, then that is cumulative to the prohibition, and the act done contrary to the prohibition may or may not, according to the subject dealt with, be an offence. In *Rex. v. Wright* (1 Burr. 543) Mr. Justice Denison thus states the rule, "Where an offence is not so at common law, but made an offence by act of parliament; yet an indictment will lie, where there is a substantive prohibitory clause in such act of parliament (though there be afterwards a particular provision, and a particular remedy given), but it is otherwise when the act is not prohibitory, but only inflicts the forfeiture, and specifies the remedy." The case of *The King v. Harris* (4 T. R. 202) was an information filed against the defendant for violating an order in council respecting the quarantine made under 26 Geo. II., ch. 6, sec. 1. No penalty was attached, and

the question was, whether the defendant, upon being found guilty of violating the order in council, could be punished as for an offence at common law, and Lord *Kenyon* said it most unquestionably was such an offence. That case was not new, for in *Rex v. Robinson* (2 Burr. 799) the defendant was indicted for notobeying an order for the maintenance of his grand-children, which order was made under the statute 43 Eliz., ch. 2, though the seventh section provided a penalty of 20s. for every month the party should fail to perform the order. I find in Mr. Chitty's Criminal Law, under the forms he gives for indictments for selling offices, &c., the very first of them is an indictment for corruptly agreeing to receive the office of distributor of stamps for the county of Dorset, on condition of allowing the former possessor to have the profits for life, and this seems to be framed upon the two statutes 5 & 6 Ed. VI., and 49 Geo. III., ch. 126. The case of the *Queen v. Price* (11 A. & E. 727) affords a proof that where a statute enjoins a thing to be done, the omission of it is an indictable offence, though nothing whatever has been said about its being punishable to omit the act enjoined. Again, *Regina v. Buchanan* (10 Jur. 736) shews that it is an indictable offence for a person to act as an attorney without being admitted, under the second section of 6 & 7 Vic., ch. 73, though nothing is said in the statute about it being a misdemeanor to do so, and although by the 35th section of the act a person so acting can maintain no action for fees, and it is a contempt of court to act without admission.

After consulting these, and many other cases, besides those cited in the argument, I entertain no doubt that the charges contained in the *scire facias*, information and case, would be an offence under the statute of Edward, and punishable as a misdemeanor at common law, and that we must treat the statute as introduced here by our legislature as part of the criminal law of England, and that an indictment or information would have been sustained independently of the act of 49 Geo. III.

With respect to the statute 49 Geo. III., ch. 126, I really do not see any principle upon which we could hold that it does not apply to the office of sheriff. The argument

concedes that this statute, being made in its terms to apply to the colonies, must be taken to be so, but then it is said that it only applies to the higher offices of state, and will not apply to the office of sheriff. If I thought it did not apply to the office of sheriff, I should still be bound to say so, so long as the case of *Foott v. Bullock* (4 U. C. R. 480) remained not over-ruled or doubted in any way. Independent of that decision, I do not see what room there can be for argument upon this point. If the statute of Edward will apply to the office of sheriff, and of which I take it there can be no question, then we have the 49 Geo. III. saying that it shall extend to Scotland, Ireland, and to all offices in the gift of the Crown in any part of the united kingdom, and all commissions under the appointment of the principal officers of any public department or office of his Majesty's government in any part of the united kingdom, or in any of his Majesty's colonies or plantations, in as full and ample a manner as if the provisions of the said act were repealed and made part of the last act, and the two acts it is declared shall be construed as one act. The principal officer of Her Majesty here most certainly is his Excellency the Governor-General, and the office in question is a government appointment under and by him. The third section enacts that any person contravening the act of Edward, as well as those violating the other act, shall be deemed and adjudged guilty of a misdemeanor. This provision puts at rest all question whether a violation of the statute of Edward should, either upon indictment or information, be treated as an offence punishable as at common law. The 49 Geo. III. extended the operation of the other statute to many other offices than contained in that statute, and if it be conceded that the offices enumerated in 49 Geo. III., would not be sufficient to embrace the office of sheriff, yet we see that parliament, at the same time they extended the operation of the other, re-enacted the other statute, or rather re-affirmed it, and made it apply in places previous to that time where its operation was not felt, and I cannot doubt but that it must be conceded by every one that its terms are large enough to embrace the office of sheriff.

Taking this case, therefore, either way, it appears to me

the information must be sustained on some one or other of the counts. I have not particularly analyzed the evidence as applicable to each particular count, for I understood what was desired was an expression of opinion whether these statutes were in force in this country, and whether the evidence would disclose a case which might be brought within either of them. I have expressed my opinion on the statutes, and as to the evidence and case, I am clearly of opinion the facts established that the defendant might have been indicted under the statute of Edward, and the first and third sections of 49 Geo. III. The information points at the offence created under the fourth section of the 49 Geo. III., and which also is made a misdemeanor. It is not denied that the evidence will establish some one or other of the counts if that clause will also apply to the office of sheriff and is in force here. The legislature has said in the first section that both acts are to be read as one act, and to be construed as if all the clauses and provisions of the statute of Edward were repealed and re-enacted. Then in the fourth section it is enacted that if any person shall pay any money for any solicitation or negotiation that shall in any wise touch or concern, or relate to any resignation of any such office *as aforesaid*, such person shall be deemed and adjudged guilty of a misdemeanor. The evidence clearly establishes that the defendant did pay Mr. Rapelje £500, and conveyed to him certain property to procure his resignation of the shrievalty of Norfolk, and thereupon he did resign, and the defendant was appointed. The offices referred to in the fourth section *as aforesaid* embrace all those mentioned in both statutes, and consequently, if the statute of Edward covers that of sheriff, then it becomes a misdemeanor to pay any money, &c., for the resignation, &c., of that office.

Judgment for the Crown.

THE BANK OF MONTREAL V. CAMERON.

Bills of Exchange—Fraud and absence of consideration—Pleading.

Action on a Bill of Exchange drawn by K. upon and accepted by defendant C., endorsed by K. to E., by E. to D., and by D. to plaintiffs.

Plea, by defendant C., that he was induced to accept by the fraud and misrepresentation of said K. E. and D., and without any consideration, and that D. endorsed to the plaintiffs without any consideration or value given by them to him.

Held, on demurrer, plea good, without averring that the plaintiffs were holders without value.

ACTION upon a bill of exchange drawn by defendant King upon, and accepted by, defendant Cameron, for £2000, dated the 29th of September, 1857, and payable sixty days after date, averring endorsement by King to one Charles F. Ellerman, by him to one Benjamin Dales, and by Dales to the plaintiffs. The defendant King did not appear.

The defendant Cameron pleaded that he was induced to accept the said bill of exchange by the fraud, covin, and misrepresentation of the said W. D. King, Charles F. Ellerman and Benjamin Dales, and without any consideration or value being given to him, the said John Hillyard Cameron, for the said acceptance; and that the said Benjamin Dales endorsed the said bill to the plaintiffs without any consideration or value being given by the plaintiffs to the said Benjamin Dales for such endorsement.

The plaintiff demurred to this plea, on the ground that it confined the plaintiffs to proving value given to Dales, whereas another party might have received the bill from Dales and given him value, or the plaintiffs might have given value to a third party who took the bill from Dales, and the plea should have alleged that there was never any value or consideration for the plaintiffs being the holders of the bill.

A. Richards for demurrer, cited *Arboin v. Anderson*, 1 Q. B. 498; *Miller v. Ferrier*, 7 U. C. R. 540, S. C. 3. C. P. 103, note (a); *Bank of British North America v. Sherwood*, 6 U. C. R. 213; *Muir v. Cameron*, 10 U. C. R. 356; *Hunter v. Wilson*, 7 D. & L. 221, 4 Ex. 489 S. C.; *May v. Seyler*, 2 Ex. 563; *Harmer v. Steel*, 4 Ex. 1; *Masters v. Ibberson*, 8 C. B. 100; *Bailey v. Bidwell*, 13 M. & W. 73;

Harvey v. Towers, 6 Ex. 656; McGillivray v. Keefer, 4 U. C. R. 456; Berry v. Alderman, 4 C. B. 95.

Cameron, Q. C., contra, cited *Fitch v. Jones*, 24 L. J. (Q. B.) 293, S. C. 5 E. & B. 238; *Hall v. Featherstone*, 31 L. T. Rep. 119, S. C., 3 H. & N. 284.

ROBINSON, C. J.—The defendant is sued as acceptor of a bill of exchange, which the declaration states was drawn upon the defendant by one King, payable to King's order, and was indorsed by King to Ellerman, and by Ellerman to Dales, who indorsed the same to the plaintiffs.

The defendant pleads in his defence that he was induced to accept the bill by the fraud, conin, and misrepresentation of the said King, Ellerman and Dales, without any consideration or value being given to him for his acceptance; and that Dales indorsed the bill to the plaintiffs without any consideration or value being given by the plaintiffs to the said Dales for said indorsement.

The plaintiffs demur to this plea, and insist that it is not even in substance a good defence, because the plea, to make it a good bar, should be such that if its statements are admitted to be true the plaintiffs have clearly no cause of action; and that this plea assumes what is contrary to law, namely, that if it be true that the defendant's acceptance was procured by fraud, and without consideration given to him, and if the plaintiffs gave nothing to Dales for the bill when they got it from him, the plaintiffs can have no right to recover, whereas the plaintiffs contend that if they gave consideration for the bill after it was endorsed and delivered to them, so that they were holders for value at the time they sued upon it, or if in fact the bill had gone through the hands of other parties whose names are not stated in the declaration, and if any one of such previous holders paid value for the bill, the plaintiffs are entitled to recover upon it.

The defendant, on the other hand, insists that the rules of pleading are not so stringent as to require that his plea, in order to make it a good defence in substance, should exclude every such inference as might be drawn from a supposed state of facts different from that which the pleadings them-

selves have set forth, and on which they found their right of action.

His argument is, that it is enough for him to say to the plaintiffs: "My acceptance, upon which you are suing me, was obtained from me without consideration, by the fraud of those very parties who alone have any thing to do with this bill according to your own statement; and you yourselves gave nothing for the bill to the person from whom you say you got it."

I do not take it to be necessary for the defendant setting up such a defence to deny that the bill had been negociated between other parties than those whom the plaintiffs have mentioned in the declaration, and that some other indorser who had not been before named had given value for it.—Chy. Plg. Vol. III. 151.

The cases decided in England before the new rules of pleading, unless where some point in the case was brought up on demurrer, do not in general give the language of the plea so fully that we can safely attach any value to the case as a precedent, and more frequently the defence, though relied upon at the trial, was not specially pleaded at all, as almost every defence could at that time be set up under the general issue.

The case of *Arbouin v. Anderson* (1 Q.B.498,) was a good deal relied upon by the plaintiffs, but really is not material, for in that case the facts on which the plaintiff depended for recovering were specially replied by him. The plea itself was not demurred to, and as the replication was held sufficient by the court, there was no necessity to pronounce upon the plea.

Two of the learned judges therefore made no remark upon it. One of the other judges intimated a doubt whether the plea might not be held bad, if it had been demurred to specially; and Mr. Justice Wightman said the plea would be bad on special demurrer, and that he had great doubts whether it would not be so on general demurrer likewise. We cannot safely calculate therefore what the judgment of the court would have been upon the plea, if it had been necessary to dispose of it upon a general demurrer.

Mr. Justice Patterson, who thought the plea might have been held bad if demurred to specially, gave as his only reason (p. 501): "That it did not state that the plaintiff gave no consideration for the bill." Now the plea in the present case does state "that Dales indorsed the bill to the plaintiffs, without any consideration or value being given by the plaintiffs to the said Dales for such indorsement." It adopts the plaintiffs' own statement of the manner in which they became holders of the bill, and avers that they took it, as they say they did, by indorsement from Dales, without any consideration given by them to him for such indorsement.

In my opinion this must be held sufficient upon general demurrer, for it is founded on the plaintiffs' own statement as to the manner in which they became possessed of the bill. If there were features in the history of the bill after it had been accepted by the defendant, and was put in circulation, which would place the plaintiffs in a better situation than they could stand in as indorsees of Dales, there is no reason to assume that the defendant had knowledge of such circumstances; and if they were known to the plaintiffs, and would furnish them with a sufficient answer to the plea, it rested with them, in my opinion, to shew them, and more especially in a case of this description, where it is not merely want of consideration for his acceptance that is relied upon by the defendant, but a fraud practised upon him in obtaining the acceptance, and where fraud is charged by the plea against the very party from whom the plaintiffs allege they took the bill.

The case was cited by the plaintiffs' counsel of *Masters v. Ibberson* (8 C. B. 100,) is more like the one before us, for their fraud in obtaining the note was set up by the maker of the note, and the court held the plea bad in substance for not alleging that the payee of the note had not given value for it. But there the fraud in obtaining the note was charged by the plea against one Bromfield only, who, from all that appeared, either in the declaration or the plea, was no party to the note. The payee, for all that was stated in that plea, might have been altogether innocent of fraud, and might have paid full value for the note. Here the payee of the bill sued

upon and his indorsee, Ellerman, and Dales, who according to the declaration took the bill from Ellerman and indorsed it to the plaintiffs, are all charged by the plea with being parties to the fraud in obtaining the bill. In such a case it is now well settled in a series of cases that the plaintiff must shew how he came by the bill. I refer to *Heath v. Sansom* (2 B. & Ad. 291,) *Mills v. Barber* (1 M. & W. 425,) and the latter cases of *Bailey v. Bidwell* (13 M. & W. 73,) *Smith v. Braine* (16 Q. B. 244,) *Harvey v. Towers* (6 Ex. 656,) *Fitch v. Jones* (5 Ell. & Bl. 238,) *Solomons v. Bank of England* (13 East 135,) and *Hall v. Featherstone* (31 Law Times 119.) Most of these cases were cited in a case in this court of *Hanscombe v. Cotton* (15 U. C. R. 42.) In *Harvey v. Towers* (6 Ex. 656), the plea stated, as is stated in this case, that the person who was charged in the declaration to have indorsed the bill to the plaintiff was concerned in the fraud by which the acceptance was obtained from the defendant, and yet in the plea, besides the averment that the indorsement *by him to the plaintiff* was without consideration, it is added "that the plaintiff *held the bill* without any value or consideration." That is what the plaintiffs contend ought to have been alleged in this case to make the plea good in substance; that is, not merely that the last indorser transferred the bill to the plaintiffs without value, but that they really *were holders without value*, so as to include, and as it were to deny by anticipation, all suggestions of a possible interest which the plaintiffs might have in the bill by reason of any thing which they, the plaintiffs, have not yet stated. In *Bingham v. Stonley* (2 Q. B. 118), the plea was so framed as to be free from any such exception as is taken here, and so it was in many others; but the precedents are not uniform, and in many of these cases no question arose upon the pleadings.

I do not find anywhere the point discussed which is raised here, namely, the sufficiency in substance of a plea which, after stating fraud to which the person indorsing to the plaintiffs was a party, avers that the plaintiffs gave nothing to him for indorsing the bill to them, without adding to that statement that the plaintiffs are not holders for value.

In the case of *Law v. Chifney* (1 Bing. N. C. 267), Bosanquet, J., observes "that what is stated in a plea ought to be an answer to the action, and inconsistent with the plaintiff's legal demand." That is the principle for which the plaintiffs contend, but the question is, whether it is not sufficiently complied with in this plea, considering the nature of the declaration and the facts stated in the plea. The plea in *Law v. Chifney* was not a defence *prima facie*, nor any thing like a defence, if all was true that was asserted in it, and if nothing further could be shewn. But in this case there is first the statement that the defendants acceptance on which the plaintiffs are suing him was obtained from him by fraud. That fact alone, if nothing more were stated, would, according to the cases I have cited, raise a presumption that they had not given value for the bill, and that they were in privity with the persons whose fraud is complained of, and were endeavouring to enforce payment for their benefit; which inference is in this case strengthened by the statement in the plea that one of those persons who had fraudulently obtained the acceptance, indorsed the bill to the plaintiffs; and when in addition it is stated in the plea that the plaintiffs did in fact give no consideration for the bill to the person who they themselves allege indorsed it to them, I think we must hold that enough is stated in substance to bar the plaintiffs' recovery till they shew how they came by the bill in such a manner and under such circumstances as may nevertheless entitle him to sue as holders for value.

Though I have a good deal of doubt upon the point, I have come to this conclusion, since we have now to give judgment upon every demurrer "according as the very right of the cause and matter in law shall appear to us, without regarding any imperfection, omission, defect in or lack of form."

It was stated I think in the argument, that besides demurring to the plea the plaintiffs have, under the new practice, by leave of the court replied to it, setting out alleged facts on which they rely as enabling them to recover notwithstanding any such fraud in obtaining the acceptance as is stated in the plea, and that the defendant has taken issue on the

replication, so that the case will eventually be determined upon its merits.

BURNS, J.—This plea is not unlike the pleas in the case of *Baily v. Bidwell* (13 M. & W. 73), and is exactly like that in *Harvey v. Towers* (6 Ex. 656), in both of which cases the pleas were traversed, not demurred to. In *Fitch v. Jones* (5 E. & B. 238). Erle, J., says this—"It is also clear that when the plea alleges that the instrument had its inception in illegality or fraud, and that the plaintiffs took it without value, proof that the instrument had its inception in illegality or fraud raises the presumption that the plaintiff took it without value, and so far shifts the burthen of proof, that unless the plaintiff gives satisfactory evidence that there was consideration for the instrument, the allegation in the plea that there was no consideration will be taken to be proved."

This plea does allege fraud in the inception of the defendant's liability as acceptor, and charges that fraud upon the person from whom the plaintiffs derive title, and alleges that this person transferred the acceptance to the plaintiffs without any consideration given by the plaintiffs.

If this allegation be an untruth, the plaintiffs are quite safe in traversing the plea. If, however, the plaintiffs have derived title to the bill from some subsequent holder other than the person last mentioned as having indorsed it to them, then the plaintiffs may reply, as was done in *Arbouin v. Anderson* (1 Q. B. 498.) No doubt, the plaintiffs need not in their declaration name all the persons through whom they claim title, but they may content themselves with saying they hold title from Dales. There is no force whatever in the argument that it entails any hardship upon the plaintiffs, to force them to disclose from whom and for what consideration they obtained the bill. Under the old form of pleading the general issue, as soon as the defendant showed that the bill was fraudulently obtained from him, the burthen of proof was cast upon the plaintiff to prove how and under what circumstances he obtained the bill, and this was so upon the presumption, as Mr. Justice Erle says, that the plaintiff gave no value.

I cannot understand upon what principle it is that a defendant must negative every state of facts in this plea under which the plaintiffs might possibly have obtained the bill. The plaintiffs rely much upon the case of *Arbouin v. Anderson*, because it is said by Mr. Justice Wightman that the plea in that case would have been bad upon demurrer. I incline to think myself that possibly it might have been held bad upon special demurrer, for there is no allegation in it that the plaintiffs gave no consideration for the bill. The statement is that there was no consideration for the person from whom the plaintiff obtained it indorsing the bill. If any thing may have been said in any of the cases which give colour to the argument for the plaintiffs in this case, I cannot help thinking it may have been said unintentionally, for I take it the defendant is not bound in the first instance to do more than answer by his pleading the case that is made against him. Here the plaintiffs say by their declaration that they obtained the bill from Dales, and in answer the defendant says that Dales obtained it from him fraudulently, and transferred to the plaintiffs without the plaintiffs giving any thing for it. The defendant cannot do more than take the plaintiffs own narrative of how their title to the bill is derived, and then answer that. He cannot tell whether the plaintiffs obtained the bill in some other way than that stated in the declaration. To compel a defendant to negative in his plea all possible ways the plaintiffs may have obtained the bill, is in effect to oblige him to answer matter not stated against him. If in truth the plaintiffs obtained the bill from Dales as they have stated, then the defendant negating the plaintiffs' title from others as a work of supererogation; and why should not the defendant believe the plaintiffs' own narrative that they got the bill from Dales? The plaintiffs must know very well from whom they obtained it, and why should not the information come from those within whose knowledge the fact lies? I cannot help thinking that it would be a violation of the rules of pleading to compel the defendant to negative by his plea a state of facts not alleged against him. It is admitted that in proof the burden of it would be shifted, and I think good sense and the proper

rules of pleading are equally in the defendant's favour as respects the pleading, and the plaintiffs should shew by their replication from whom they obtained the bill, and the consideration they gave for the bill, if they depend upon title from some other person than already appears.

MCLEAN, J., concurred.

Judgment for defendant on demurrer.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

FROM TRINITY TERM, 22 VICTORIA, TO
HILARY TERM, 22 VICTORIA.

ABANDONMENT.

Of instructions to Sheriff.]—See
SHERIFF.

ABSCONDING DEBTOR.

1. *Attachment—Execution—C. L. P. A., secs. 53, 55.*]—The plaintiff obtained execution against A., whose goods were then under seizure upon an attachment issued against him as an absconding debtor. The sheriff, under C. L. P. A., sec. 53, having sued and obtained payment of a sum due by one of A.'s debtors—*Held*, that such money was not liable to the plaintiffs execution, but must be divided among the attaching creditors. *Cann v. Thomas*, 9.

2. *Attachment—Service out of the jurisdiction—Priority.*]—A. having a claim against an absconding debtor, sued out a writ of summons against him as residing out of the jurisdiction, served the writ on him in the state of New York *on the same day* that an attachment issued against him here, and obtained judgment and execution before the first attaching creditor. *Held*, that

to entitle him to priority he must also shew that his writ was served before the attachment issued, and no evidence being given to shew at what time of the day either event took place, that the attaching creditor's claim must prevail. *Quære*, whether a service out of the jurisdiction would be sufficient, even if made before the attachment issued. *Daniel v. Fitzell et al.*, 369.

3. *Attachment—Confession of judgment—Priority—Fraud.*]—Where an absconding debtor's goods have been attached, a creditor obtaining a confession of judgment from him, without service of process, and execution upon it before the attaching creditors, does not obtain priority. *Held*, that on the affidavits filed no case was made out for setting aside the judgment so obtained on the ground of fraud or collusion. *Bird et al v. Folger et al.*, 536.

ACCORD AND SATISFACTION.

See ACTION, 3.—PRINCIPAL AND SURETY.

Pleading.]—To a declaration for

work and materials, defendant pleaded that before action he satisfied and discharged the claim "by delivering to the plaintiff according to agreement a certain promissory note, &c. *Held*, bad, for, not averring that the plaintiff accepted the note in satisfaction. *Brown v. Jones*, 50.

ACCOUNT STATED.

See CONTRACT, 3.

ACTION.

See ASSIGNMENT OF DEBTS.--BUFFALO AND LAKE HURON R. W. CO. CONTRACT, 3.--ELECTIONS.--GREAT WESTERN RAILWAY CO., 1, 2, 3.--HIGHWAY, 1.--PRINCIPAL AND AGENT.--RAILWAYS AND RAILWAY COS., 1, 3.--SHE-RIFF.

1. *Wharf--Duty to repair--Proof of ownership--Excessive damages.*].--*Held*, that under the evidence in this case, the ownership and possession by defendant of the wharf in question was sufficiently shewn to sustain an action against them by the plaintiff for injuries occasioned to him by not keeping it in repair; and that the damages given were not excessive. *Johnson v. The Port Dover Harbour Company*, 151.

2. *License fees received by reeve--Dispute between him and treasurer as to receipt by the latter--Settlement of accounts with the municipality--Subsequent action by them--Competency of treasurer as witness--16 Vic., ch. 19.*].--The reeve of a township received certain moneys for license fees, which, as he alleged, he paid to the treasurer, whose receipt he produced for part of the sum in cash and a note for the balance.

The treasurer denied having received the note or balance, and at his instance the municipality, by resolution, allowed an action to be brought for it in their name against the treasurer. They afterwards rescinded this resolution, but the action went on; and at the trial it appeared that the whole sum had been charged by the treasurer to himself in his account for the year, which, as well as the accounts for three subsequent years, had been audited and passed, shewing a general balance for that and the other years due by the treasurer. *Held*, that the action could not be maintained by the municipality; and that, if it could, the treasurer would not have been admissible as a witness. *The Municipality of the Township of King v. Hughes*, 253.

3. *Permission to make a ditch over plaintiff's land--Negligence in making it--Action therefor--Pleading--Agreement to accept, and payment in satisfaction--Traverse of payment.*].--*Sixth count*, That defendants so negligently constructed their railway, and made their ditches, &c., so carelessly that they caused the surface water on each side of the railway crossing the plaintiff's farm to flow out of the ditches and injure the crops: that to remedy this the plaintiff allowed defendants to cut a ditch leading from their ditches across the plaintiff's land to the lake; that they began to make such ditch; and it thereupon became their duty to use proper care, so that it should be sufficient to carry off the water; but they made it only a short distance, and of insufficient size, so that it brought down the water upon the plaintiff's land, and left it there. *Seventh count*, that by articles of agreement between the plaintiff and defendants, reciting that the

plaintiff had conveyed certain land to defendants for their railway. defendants covenanted that they would make a sufficient crossing on the plaintiff's land: that they made their railway, but neglected to construct the crossing, whereby the plaintiff was put to inconvenience, &c. Among other pleas, defendant pleaded to this count a former action on the same covenant, alleging that in that action, after issue joined. it was agreed that defendants should pay £125, in full satisfaction and discharge of the cause of action, and that the plaintiff should accept the same, and that the £125 was thereupon paid and accepted, &c., to which the plaintiff replied, traversing the payment and acceptance in satisfaction, &c. An agreement was proved, purporting to be between the plaintiff and defendants, but executed by the plaintiff only, wherein it was stated to be agreed that the company should dig the ditch as mentioned in the sixth count; and a memorandum was added under the plaintiff's signature, that they would continue to deepen his ditch, if necessary to carry off the water. It was proved, also, that they did begin the ditch, but made it only part of the way to the lake, so that the only effect was to lead the waters from the railway on to the plaintiff's land. As to the plea to the seventh count, the plaintiff wished to shew that besides paying the £125, defendants were to make the ditch to the lake. The jury found for the plaintiff, £75 on the 6th count, and £200 on the 7th. *Held*, that the plaintiff was entitled to recover upon the sixth count, for although the defendants were not bound to make the ditch at all, yet, as they had commenced it by the plaintiff's permission, they were

liable for injury caused by their carelessness in constructing it. *Held*, also, that on the seventh count, under the plaintiff's replication, the only question in issue was the payment of the £125, not the agreement to accept it in satisfaction, and that the verdict on that count could not be sustained. *Utter v. The Great Western Railway Company*, 392.

ADMINISTRATORS.

See PRESUMPTIONS.

AFFIDAVITS.

See CHATTEL MORTGAGE, 3. 4.—
INSURANCE, 3, 5.

Entitling of on motion for prohibition.—See DIVISION COURT, 1.

Quære, whether affidavits sworn before a British consul in the United States can be read in answer to a rule in this court. *Bird et al. v. Folger*, 536.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AMENDMENT.

See INSURANCE, 1.—SET OFF.

Discontinuance by mistake against two of several joint debtors—Amendment—Discontinuance against the others allowed after verdict.—The plaintiffs having taken a joint and several bond from defendants for a debt of £5,000, declared against them all as upon a joint bond only. One of the defendants pleaded a

special plea, and another demurred, and the plaintiffs' attorney, being under the impression that the bond had been declared upon as joint and several, discontinued as against these defendants, and took a verdict against the others, who moved to arrest the judgment. The sum being large, on motion made in the following term, the court allowed the plaintiffs to discontinue against the last mentioned defendants, on payment of all costs, so that the claim might not be defeated. *The Commercial Bank of Canada v. Cameron et al.*, 237.

APPEAL.

See ASSESSMENTS, 1.

1. On appeal from the county court, the proceeding must be certified, *and the case set down for argument*, in the term after delivery of judgment there. *Simpson v. Great Western R. W. Co.*, 57.

2. *County court—Omission in recital of appeal bond—Re-execution—Refusal to certify papers of appeal.—Mandamus—Demurrer to return.*]

—The defendants in a suit in the county court gave notice of appeal from the judgment there, and on the 18th of January an order was made by the judge staying proceedings for four days, to allow them to give bonds for appeal, and directing the bond to be taken in \$600. On the 19th the bond was filed, the proper penalty being inserted in the obligation, but before the condition there was a recital of the judge's order, in which this same sum was left blank. The judge observing this omission in the bond filed, pointed it out to the defendant's attorney, who inserted the sum; but the judge afterwards required him to

get the bond re-acknowledged, and he procured it from the clerk of the court for that purpose. The plaintiff's attorney called to inspect it, and finding it gone gave notice of taxation; but it was returned before judgment entered, and notice given to the plaintiff's attorney that the judgment, if entered, would be moved against. Judgment was nevertheless entered, and a summons obtained to set it aside was discharged, on the ground that the bond when first filed was defective, and that it had not been re-filed with an affidavit of execution after being corrected. The judge afterwards refused to transmit the papers for appeal, and a mandamus *nisi* having been obtained, returned the above facts. The defendant demurred to the return, and moved to quash it. *Held*, 1. That in this country there can be no demurrer to a return, the statute allowing it in England, 6 & 7 Vic., ch. 67, not being in force here. 2. That the return was insufficient, and must be quashed, for that the bond was sufficient when first filed, the omission being immaterial: that the sum might have been inserted without re-execution, and that it was therefore unnecessary to file any new affidavit. *Regina v. Wells*, 545.

3. A case settled by consent in the county court without pleadings, is not appealable. *Harding v. Knowlson et al.*, 564.

APPROPRIATION OF PAYMENTS.

See LANDLORD AND TENANT.

ARBITRATION AND AWARD.

See LEASE, 2.—MUNICIPAL CORPORATIONS, 1.

Submission by cestui que trust, not binding on trustee.]—See LEASE, 1.

1. *Action on award—Plea, no award—Effect of—Reference by resolution of municipality.*]—A municipality by by-law opened a road across the plaintiff's property, and arbitrators were appointed under the 16 Vic., ch. 181, one by the council, one by the plaintiff, and a third by a judge of the county court, to determine what compensation should be paid to him. Afterwards a resolution was passed by the council, that the arbitrators so chosen should be instructed to take into consideration the damages to the plaintiff's crops and fences, so that all differences might be settled; and they awarded separate sums for opening the road and for damages, respectively. The plaintiff having brought debt on this award, defendants pleaded no award. *Held*, that under this plea they could not dispute the arbitrators' authority to award the latter sum; but should have moved to set aside the award, or might have pleaded *nunquam indebitati* to that sum which would have brought the submission in issue. *Quære*, whether the resolution was binding upon the council as a reference. *Hodgson v. The Municipality of the Township of Whitby*, 230.

2. *Agreement to refer—Mutuality—Agreement by one partner for the firm.*]—In an action on an agreement under seal to abide by an award, it is no objection in arrest of judgment that the submission is not stated to be mutual. The declaration alleged that defendant agreed *with the plaintiffs* to refer. *Held*, not supported by proof of an agreement made and executed by one plaintiff only on behalf of himself and the others, being his partners. *French et al v. Weir*, 245.

3. *Arbitration on opening road—Publication—Second award—Proof of by-law—Declaration—Arrest of judgment.*]—Action against a municipal corporation upon an award in favour of the plaintiff for land taken from him for a road. It appeared that the plaintiff named one arbitrator, H., and the reeve another, S.; and they being unable to agree upon a third, the county court judge appointed one B. B. and H. on the 30th of June signed the award sued on, giving £40 to the plaintiff. Afterwards the council called another meeting of the arbitrators, when all three attended, and B. and S. afterwards executed another instrument as their award, by which the plaintiff was to have only £3 10s. *Held*, that the first award was good, and the plaintiff entitled to recover upon it: that under the 16 Vic., ch. 181, sec. 33, it was sufficiently published when it was signed by the arbitrators; that defendants having appointed an arbitrator, it was unnecessary to prove any by-law for opening the road: that an action was clearly maintainable upon such an award; and that it was no objection to the declaration that it was upon a submission to three arbitrators while two only executed the award, for the statute authorises two to act. *Harpel v. The Municipality of The Township of Portland*, 455.

ARREST.

See MALICIOUS ARREST.

ARREST OF JUDGMENT.

See ARBITRATION AND AWARD, 2.

ASSAULT.

See RECOGNIZANCE.

ASSESSMENTS.

See TAXES.

1. *Assessment of property not assessable—Defence to action—Court of revision.*]—Where the assessor illegally assessed the superstructure of a railway as well as the land occupied by it—*Held*, that the company might defend an action as to the superstructure, although no appeal had been made to the court of revision, and although the whole was called land in the assessment. *The Municipality of the Township of London v. The Great Western Railway Company*, 262.

2. It is no defence to an action for taxes, that defendant's property was rated higher than the average value of land in the locality, as assessed for the same year. The only remedy in such a case is by appeal to the court of revision. *Ib.*, 267.

3. *Liability of trustees and executors.*]—Where executors and devisees in trust of land were assessed as owners, *Held*, that they were properly so assessed, and that their own goods might be seized for the taxes. *Denison v. Henry*, 276.

4. 19 & 20 Vic., ch. 97—*By-law—Imposition of rates—Pleading.*]—*Replevin*. The defendants avowed under a by-law of the city of London, passed under the 19 & 20 Vic., ch. 97, on the 11th of January, 1858, averring that the amount of real property benefitted by certain sewers mentioned in the by-law and statute was £29,508 "according to the assessment returns for the same and the said by-law:" that a rate was directed to be levied on the proprietors of such property, of whom the plaintiff was one, and that on his refusal to pay defendant as collector seized his goods. The plain-

tiff demurred, on the ground that the rate imposed by the by-law was for 1858 upon the assessment returns of 1857, whereas it should have been upon the assessment of 1858; but, *Held*, (confirming the judgment of the court below,) that the plea was good. *McCormick v. Oakley*, 345.

ASSESSORS.

Appointment of.]—See MUNICIPAL CORPORATIONS, 2.

ASSIGNMENT.

See MONEY HAD AND RECEIVED.—SHERIFF'S SALE.

1. *In trust for creditors—Nature of the change of possession required—20 Vic., ch. 3.*]—In considering whether a sufficient change of possession has taken place to satisfy the statute, regard must be had to the nature and purpose of the assignment, and the circumstances of the case; and when made by a merchant for the benefit of his creditors, it is not to be expected that the assignees should remove the goods, or take exclusive possession, as in the case of an ordinary sale of goods. The assignor may continue upon the premises, and assist in disposing of the goods, without vitiating the assignment in law, but it is a fact to be left to the jury as evidence to shew that the transfer was colourable. *Held*, that upon the evidence in this case the jury were warranted in finding an actual and continued change of possession. *Maulson et al v. The Commercial Bank*, 30.

2. *Construction of—Account books—Schedule filled up after execution—Replevin.*]—*N. & Co.*, by deed, assigned to M. all and

singular the "furniture," &c., "and effects of them, the said N. & Co., and which will be more particularly mentioned and described in the schedule to these presents hereafter to be annexed, marked A., and all other their personal estate and effects whatsoever and wheresoever situated." The schedule was not filled up at the time of executing or filing the assignment, but was afterwards filled up by a third person without reference to the assignors, and the books in question were mentioned in it, but remained in their possession. Afterwards N. & Co., by another deed, assigned to the plaintiff all the debts owing to them, giving him power to examine and take extracts from their accounts for the purpose of making up and adjusting such debts properly. The books were handed to the plaintiff by N. & Co., in pursuance of this deed, and having been taken from him by defendant he replevied. Defendant set up M.'s right. *Held*, that the plaintiff was entitled to recover, for the schedule to the first assignment, filled up as it was, could have no effect, and the books did not pass under the operative words. *Crawford v. Brown*, 126.

3. *In trust for creditors—Improper stipulations—Change of possession—Description of goods.*]—"All and singular the stock in trade of the said W.," (the assignor) "*situate on Ontario street*, in said town of Stratford, and also all his other goods, chattels, and furniture, &c." *Held*, an insufficient description as to all the goods. In an interpleader issue to try the validity of an assignment in trust for creditors, the court being left to draw the same inferences as a jury: *Held*, that it was fraudulent for the as-

signor to assign on the understanding that he should be allowed to keep possession of his household furniture. *Held*, further, that the assignment was also fraudulent, because it contained a stipulation that no creditors should share except those executing within forty days, and a release in full on condition of their getting the dividend out of the proceeds of the goods assigned, with a proviso that the surplus should go to the assignor. *Held*, also, that the facts stated in the case did not shew a sufficient change of possession to dispense with filing. *Wilson v. Kerr et al.*, 168.

4. *In trust for creditors—Provisions for release—Effect of fi. fa. before execution by creditors.*]—An assignment for the benefit of creditors is fraudulent as against non-executing creditors if it exacts a release in full from those who execute. If the assignee be not a creditor, such assignment is void against an execution coming in before any creditor has executed. *Maulson v. Topping et al.*, 183.

ASSIGNMENT OF DEBTS.

See CONTRACT, 3.

Attachment—Right of action by assignee.]—K. owned a propeller which had been employed by government, for whom S. was acting as agent. He sold her to the plaintiff, and addressed the following letter to S : DEAR SIR,—as owner of the Prop. 'S. C. Ives,' now employed by you on account of the Canadian Government in conveying materials to Point au Pelé light house, I beg to inform you that I have this day conveyed to E. J. Stirling, Esq., of Cleveland, all my

right to the payment of moneys for services performed by said boat under our contract. You will therefore, after presentation of this, account to him or his agent for such sums as said boat may be entitled to on account of work performed under our contract." At the foot of this was an order, signed by the plaintiff, to pay the money to the captain of the vessel. This money was afterwards seized by the sheriff under an attachment against K., which was subsequently set aside. Whether it was so seized in the hands of S. or of the captain of the vessel did not appear. *Held*, (*McLean*, J., dissenting), that the plaintiff might maintain an action against the sheriff for the money in his own name. *Sterling v. McEwan*, 361.

ATTACHMENT OF DEBTS.

Assignment of debts—Attachment—Pleading.]—To an action on the common counts defendants pleaded that before this suit the plaintiff assigned the claim to one G.: that one H. recovered judgment against G. for an amount exceeding this debt, and obtained an order to attach all debts owing by defendants to G., to answer said judgment, and this debt then became bound in defendants' hands to answer the judgment. *Held*, bad, the debt not being one which could be attached as by law due to G. *Arthur v. Clough, et al.*, 302.

ASSURANCE.

See INSURANCE.

ATTACHMENT.

See ABSCONDING DEBTOR.

ATTORNEY.

Several executions improperly enforced—Poundage—Attorney ordered to pay.]—See POUNDAGE.

BANKRUPTCY.

See INSOLVENCY.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See DIVISION COURT, 1.—ESTOPPEL, 1.—EVIDENCE, 2.—INSOLVENCY.—LIMITED PARTNERSHIP. MERGER.—PRACTICE.—PRINCIPAL AND SURETY, 3, 4.

1. *Notice of non-payment*]—A note was presented for payment on the 9th of March, at G., where the indorser lived, and the notice was mailed on the following day at M., a village five miles distant, but was not received at G. until the 13th. *Held*, sufficient. *Taylor v. Grier*, 222.

2. *Bill of Exchange—Fraud and absence of consideration—Pleading.*]—Action on a bill of exchange drawn by K. upon and accepted by defendant C., endorsed by K. to E., by E. to D., and by D. to plaintiffs. *Plea*, by defendant C., that he was induced to accept by the fraud and misrepresentation of said K., E., and D., and without any consideration, and that D. endorsed to the plaintiffs without any consideration or value given by them to him. *Held*, on demurrer, plea good, without averring that the plaintiffs were holders without value. *The Bank of Montreal v. Cameron*, 636.

BILL OF SALE.

See ASSIGNMENTS.—CHATTEL MORTGAGE.

BOND FOR DEED.

See DEMAND OF POSSESSION.

BOOKS.

Held not to pass under an assignment.—See ASSIGNMENT, 2.

BRIDGES.

See TOLL.

BUFFALO & LAKE HURON
RAILWAY COMPANY.

Action for taking gravel—Agreement by B. B. & G. R. W. Co.—How far binding on defendants—Agreement with two—Separate actions by each—Right to plead not guilty by statute.—The first count charged that defendants wrongfully entered upon the plaintiff's land, and carried away gravel therefrom, then lying lower than two and a half feet above the level of the lake, thereby making the soil rough and uneven, and rendering a large portion of it wet and unfit for cultivation. The second count alleged that the plaintiff was seised for his life of the land, and one R. owned the reversion; and that by an agreement between them and the Buffalo, Brantford, and Goderich Railway Company, they granted to the said Company the two first ridges of gravel next the lake; and the Company thereby agreed to leave the ground two and a half feet in depth above the level of the lake, and the surface even and level: that afterwards, and after the passing of the act 19 Vic., ch. 21, the said Company, under that act, delivered over their railway to defendants, and defendants completed the same under the agreement set forth in the statute: that defendants chose to enforce the said

agreement with the plaintiffs, and removed the gravel, but dug pits, contrary to the agreement, below the stipulated depth, thereby injuring the land. R. brought a separate action as reversioner for the same injury. Defendant, in each case, pleaded not guilty, by statute. The agreement, when produced, appeared to be with both plaintiffs jointly. *Held*, that the plaintiff could not recover on the first count, for defendants, by the 19 Vic., ch. 21, were entitled to take the gravel, either on making compensation, as pointed out by section 28, or under their agreement; nor under the second count, for defendants were not bound by the agreement; and, besides, it being entered into with the plaintiffs jointly, they could not maintain separate actions. *Robinson, C. J.*, dissenting as to the second count, and holding that this was not a cause of action to which defendants were entitled to plead not guilty by statute, and therefore the objection could not be taken.

Samuel Pew v. The Buffalo & Lake Huron Railway Co., and *Richard Pew v. The Same*, 282.

BY-LAW.

See ARBITRATION AND AWARD, 3.—
ASSIGNMENTS, 4.—ONTARIO, SIM-
COE, &c., R. W. Co.

1. *Delay—Refusal to quash*.—Upon an application to quash a by-law establishing a road, where two years had been allowed to elapse, and money had been expended under it, the objections not being clearly established, the court refused to interfere. *Quare*, as to the power of the court to quash for objections not appearing on the face of the by-law. *Standley v. The Municipality of Vespra and Sumidale*, 69.

2. *Want of Seal.*—The court refused to quash a by-law on the ground that it had not been sealed, as without the seal it could not be treated as a by-law. In the matter of Croft and the Municipality of the Township of Brooke, 269.

To establish school sections—Want of certainty.—*Held*, that the by-law set out in this case was bad for not describing or defining with sufficient certainty the limits of the school sections intended to be established by it. Haacke v. The Municipality of Markham, 562.

CERTAINTY.

See BY-LAW, 3.

CERTIORARI.

1. A case being at issue in the County Court, was removed into this Court by certiorari, and the plaintiff proceeded upon the pleadings as they stood, filing no new declaration, and entering no appearance above. *Held*, that defendants having gone to trial without objection, were not in a position after verdict to object to the irregularity. Fulton v. The Grand Trunk Railway Co., 428.

2. *Practice—Appearance—Waiver.*—Where a cause is removed from the County Court by certiorari after issue joined, *Semble*, that the plaintiff should declare *de novo* in the court above. In this case the plaintiff did so declare, and signed judgment in this court, though the defendants had not appeared. Defendants moved in Chambers to set aside the judgment on other grounds, but made no objection for the want of appearance. *Held*, that they were precluded from afterwards objecting on that point. Hankey v. the Grand

Trunk Railway Company of Canada, 472.

CHATTEL MORTGAGE.

See ASSIGNMENT.

1. A chattel mortgage executed before the 20 Vic., ch. 3, does not require re-filing. Culloden v. McDonnell, 359.

2. *Description of goods*—20 Vic., ch. 3, sec. 4.]—The goods were described in a chattel mortgage as “seven horses, three lumber wagons, one carriage, one pleasure sleigh, all the household furniture in possession of the said party of the first part, and being in his dwelling house, all the lumber and logs in and about the saw-mill and premises of the said grantor, and all the blacksmith’s tools now in possession of the said party of the first part, six cows and four stoves.” *Held*, a sufficient description as to the household furniture, lumber and logs, and insufficient as to the other goods. Ross v. Scott, 385.

3. *Affidavit—Omission of the words, “against the creditors of the mortgagor”*—*Statement of contingent liability*—20 Vic., ch. 3.]—L. executed a chattel mortgage to the plaintiffs for £140 2s. 5d., reciting that he was indebted to them in £214 10s. 11d.: that they had become security for him as indorsers of a note for £25 11s. 6d., making together £240 2s. 5d., for £100 of which he had previously given them another mortgage. The affidavit filed with this mortgage stated that defendant was justly and truly indebted to the plaintiffs in £214 10s. 11d.: that £100 of it had already been secured: that the liability of the plaintiffs, with the sum of £25 11s. 6d. for the said L., was

truly set forth in the mortgage; and that the said mortgage was executed in good faith, and for the express purpose of securing the payment of the money so justly due as aforesaid, and of securing the plaintiffs in their said liability, and not for the purpose of protecting the goods and chattles mentioned in the said mortgage, or preventing the creditors of the said L. from obtaining payment of any claim against him. In an action of trespass against the sheriff for seizing the goods under an execution, *held*, 1, that the affidavit was insufficient, for omitting to state that the mortgage was not made for the purpose of protecting the goods "against the creditors of the mortgagor," those words being required by the statute. 2. That the mortgage was defective, in not showing sufficiently the terms, nature, and effect of the liability incurred by endorsing. *Boulton and McCarthy v. Smith, Sheriff, &c.*, 400.

3. *Affidavit*—"Creditor" for "creditors."]—An affidavit under 20 Vic., ch. 3, that the chattle mortgage was not made for the purpose of "preventing the creditor," (instead of creditors) "of such mortgagor obtaining payment of any claims against him." *Held*, insufficient. *Harding v. Knowlson, et al.*, 564.

COMMISSION TO EXAMINE WITNESSES.

Evidence under commission—*Mention of time and place*—*Evidence not taken as directed*—*Objection made too late.*]—Defendant having made one objection to evidence taken under a commission, which was overruled, allowed it to be read, and commented upon it. *Held*, that he was precluded from taking any

further exceptions. Where the commission prescribed a particular time and place for taking the evidence, *quære*, as to the effect of neglecting this direction. *Farrell v. Stephens*, 250.

COMMON LAW PROCEDURE ACT.

See EQUITABLE PLEADINGS.
—LANDLORD AND TENANT.—INSURANCE, 1, 4.—MISJOINDER.
NOTICE TO PRODUCE.—PRINCIPAL AND SURETY, 2.

COMMON SCHOOLS.

See BY-LAW, 3.—MANDAMUS, 1.

1. *Mandamus to levy rate for schools.*—*Demand and refusal.*]—Mandamus to a municipality to levy a rate for school purposes refused, because the demand and refusal of a certain sum was not sufficiently shewn. *Quære*, however, whether a mandamus would lie in such a case, the trustees having power themselves to raise the money. In re, the School Trustees of Collingwood and The Municipality of Collingwood, 133.

2. *By-Law*—*Alteration of school sections.*]—*Held*, affirming *Ness* and the Municipality of Saltfleet, 13 U. C. R. 408 that to alter the boundaries of a school section within a township, not being a union section, it is only necessary that the alteration shall not go into effect before the 25th of December following, and that it must appear to the municipality that all parties affected have had due notice. *Held*, also, that notice in this case was sufficiently shewn. In re. Isaac and the Municipality of Euphrasia, 205.

CONDITION PRECEDENT.

See CONTRACT, 2.

CONFESSION OF JUDGMENT.

See ABSCONDING DEBTOR, 3.—
MERGER.—PRESUMPTIONS.

CONTESTED ELECTIONS.

See ELECTIONS.

CONTRACT.

See BUFFALO AND LAKE HURON
R.W. CO.—GREAT WESTERN R.
W. CO. 1.—INSURANCE, 2.—IN-
TEREST.—LEASE, 2.—MONEY
HAD AND RECEIVED.

1. *Agreement to give new contract if first abandoned—Construction of—Demurrer too large—Practice.*—Declaration by A. B. and C., plaintiffs. First count, that A. and B. agreed to perform certain work on a railway for defendant, and having associated C. with them as a co-partner, commenced the same: that defendant became desirous of discontinuing and suspending said work, and then it was agreed between the plaintiffs and defendant in writing that it should be suspended, and at the option of defendant entirely abandoned, and if abandoned that the plaintiffs should receive from defendant another contract on a substituted line equally advantageous to them, and if the work should be resumed the plaintiffs should repay defendant a specified sum. *Breach*, that defendant wholly refused to allow the plaintiffs to resume said work, and hindered and prevented them from so doing, and neglected to give the plaintiffs another contract and took said work into his own hands, and gave it to other persons. The second count

alleged an agreement with all the plaintiffs to do the work, and charged that defendant refused to allow them to go on with it. *Held*, on demurrer to the whole declaration, that the first count was bad, as not shewing a breach of the agreement declared upon, which was only to give a new contract if the first should be abandoned, and it was not abandoned, but gone on with. *Held*, also, that the second count was good, and that there was clearly no misjoinder, both being on agreements with all the plaintiffs. One count being good and the other bad, the court gave judgment accordingly, and not against the demurrer generally as being too large. *Gould et al. v. Gzowski*, 52.

2. *Construction of—Condition precedent.*—*Declaration.*—That the plaintiffs agreed to complete the ballasting of a certain portion of defendants' railway, and to construct stone culverts and bridge abutments at certain points, and to do the grading necessary, &c., all to be completed before the 1st of January, 1859, provided the company should furnish cash to meet the monthly estimates of the engineer; that the plaintiffs commenced and were ready to complete the work, but defendants wrongfully prevented and discharged them. *Plea*, that by the same agreement it was provided, that whereas the plaintiffs had leased said railway from defendants by lease bearing even date with the agreement, in which it was provided that £30,000 should be expended by defendants on the completion of the road before the rents should be payable, and whereas defendants were unable to raise the £30,000, it was therefore agreed that the plaintiffs should work the road free of any charge for the use of it, and should ex-

pend the surplus earnings on the completion thereof, the amount so expended to be taken as part of the £30,000: that the lease so made was for the express purpose of enabling the plaintiff to work the road, and raising thereby enough to enable defendants to pay them for the work contracted to be done by them: that the plaintiffs, although they had the free use of the road, refused to work, and abandoned the same, whereby they forfeited the contract, and defendants therefore prevented them from proceeding with the work, as they lawfully might. *Held*, on demurrer, plea bad, the agreements being independent. *Tate and Clark v. The Port Hope, Lindsay and Beaverton Railway Company*, 354.

3. *Contract—Assignment of—Right of action—Account stated.*]—In an action for work and labour against the executors of Z., it appeared that the work was done under two sealed contracts, entered into originally by Z. with one B., who had sub-let one of these contracts to the plaintiff and M., and the other to the plaintiff and D. The plaintiff had, by subsequent agreement with M. and D., respectively, acquired the sole interest in each of these contracts; but *after* he had done so, on each contract between B. and his sub-contractors an agreement under seal was endorsed, by which B. assigned all his interest in these contracts respectively to Z., and the sub-contractors—the plaintiff and M. in the one case, and the plaintiff and D. in the other—agreed to accept Z. in place of B., and Z. agreed to assume the contracts, as if originally made by him with the sub-contractors. The agreement endorsed on the contract between B. and the

plaintiff and D. was not executed by D. *Held*, that the plaintiff could not recover alone, the liability being to himself jointly with M. and D. respectively on the respective contracts. The plaintiff also sued on account stated, and relied upon an account made out by defendants' book-keeper, headed as an account of the plaintiff with the estate of Z., including this work, and shewing a balance due to him; but the book-keeper stated that it was made out at the plaintiff's request, and on account of the sealed contracts. *Held*, not sufficient to give a right of action to the plaintiff alone. *Zimmerman v. Woodruff et al., executors*, 584.

CONVEYANCE.

See DESCRIPTION.—VARIANCE.

CONVICTION.

See RECOGNIZANCE.—CRIMINAL LAW.

CORPORATIONS.

See GREAT WESTERN RAILWAY CO., 1.—HIGHWAY, 2.—PRINCIPAL AND AGENT.—MUNICIPAL CORPORATIONS.

COSTS.

See DOWER, 1.—REGISTRAR, 1.

COUNTY COURT.

See APPEAL.—CERTIORARI.

Right of County Court judge to maintain an action for his fees for taking evidence in contested election cases.]—*See* "ELECTIONS."

COVENANT.

See SHERIFF, 2.

CRIMINAL LAW.

See HIGHWAY, 2.—OFFICE, 2.—
RAILWAYS AND R. W. COS., 2.—
RECOGNIZANCE.

1. *New trial*—20 *Vic., ch. 61.*]—
In a criminal case, the court refused,
on a motion for a new trial to receive
an affidavit of a witness that he had
misapprehended a question put to
him. *Tegina v. Crozier*, 275.

2. The court is not authorised
to grant a new trial in criminal
cases on the discovery of new
evidence, or for the misconduct of
the jury. *Regina v. Oxentine*, 295.

3. "Mr. Warren, please let the
bearer, William Tuke, have the
amount of ten pounds, and you will
oblige me—B. B. Mitchell." *Held*,
an order for the payment of money,
not a mere request. *Regina v.*
Tuke, 296.

CROWN GRANT.

See PATENT.

CROWN OFFICE.

Right to search for judgments.]—
A person is entitled to search at the
Crown Office for judgments against
any number of persons named, and
the clerk of the Crown should allow
him to make such search, if a long
one, at whatever time is most con-
venient with respect to the other
business of the office. He is not
entitled to search the judgments
entered during a particular period,
without reference to any named
parties. In the matter of the Can-
ada Trade Association, 542.

DAMAGES.

See REPLEVIN.

Excessive.]—See ACTIONS, 1.

DEED.

See DESCRIPTION, 2.—VARIANCE.

DELAY.

See BY-LAW, 1.

DEMAND OF POSSESSION.

Bond for a deed—Ejectment.]—
Plaintiff sold a lot to defendant and
gave a bond for a deed, receiving
defendant's bond for the purchase
money. Nothing was said about
possession in either instrument.
Defendant having made default in
payment, after having been for
some time in possession, *Held*, that
the plaintiff could maintain eject-
ment without either notice to quit
or demand of possession. *Quære*,
as to the effect of the issue in eject-
ment now being only as to the
right of possession. *Robinson v.*
Smith, 218.

DEMURRER.

To return to mandamus.]—See MAN-
DAMUS, 3.

On demurrer to the whole decla-
ration, one count being good and
the other bad, the court gave judg-
ment accordingly, and not against
the demurrer generally, as being too
large. *Gould v. Gzowski*, 52.

DESCRIPTION.

"From lots 1 to 13" excludes
both 1 and 13.]—*Haggart v. Kerna-*
han, 341.

2. *Conveyance—Description of the land—Construction of.*]—"Part of broken lot number ninety-four and number ninety-five and ninety-six," means part of number ninety-four, and the whole of ninety-five and ninety-six; but, *Held, Burns, J.*, dissenting, that in this case the particular description by metes and bounds in the deeds so clearly excluded part of ninety-five as to control the general words preceding, and prevent the whole from passing. *McCollum v. Wilson et al.*, 572.

Of goods in assignment.]—See ASSIGNMENT, 3.—CHattel Mortgage, 2.

Of business to be carried on, in formation of limited partnership.]—See PARTNERSHIP, 1.

Sheriff's sale—Description of land advertised inconsistent with land sold.]—See SHERIFF'S SALE.

Inconsistent description of land in sale for taxes.]—See TAXES.

In will.]—See WILL.

DEVISES.

See WILL.

DISTRESS.

See AMENDMENT.

DISTRESS.

See LANDLORD AND TENANT.—LEASE, 2.

Lessee's goods sold for taxes and left on premises—Liability to seizure for rent.]—C. owned a boiler and smoke-pipe, which had been erected in a building of which he was sub-lessee. On the 19th of Febru-

ary they were sold for city taxes due by him, and bought by the plaintiff; but the whole purchase money not being paid, they were left in charge of the city chamberlain. On the 23rd he settled the balance, and was removing the goods on the 26th, when they were seized for rent due to the original landlord. *Held*, that they were liable to such seizure. *Held*, also, that the goods could not be considered as in the custody of the law after the sale on the 19th of February. *Langton v. Bacon*, 559.

DIVISION COURT.

See NOTICE OF ACTION.

1. *Prohibition—13 & 14 Vic., ch. 53 sec. 23.*]—It is no ground for a writ of prohibition to a division court that the judge decided against law and good conscience, if he had jurisdiction in the case. The affidavit on which such a writ is moved for should not be entitled in any court. *Semble*, that a recovery should not be allowed in such court against an indorsee of a promissory note without proving either presentment or notice. *Siddall v. Gibson et al.*, 98.

2. Executions from a division court do not bind the property before they are placed in the bailiff's hands; and, *Quære*, whether before an actual seizure. *Culloden v. McDowell*, 359.

DOWER.

1. *Costs.*]—In an action of dower, where a demand is averred in the declaration, and judgment allowed to go by default, costs may be recovered. *Harris v. Morden*, 278.

2. *Non-tenure.*]—Since the 13 &

14 Vic., ch. 58, the same persons are liable to an action of dower as before, and non-tenure is therefore still a good defence. *Harris v. Stratton*, 520.

EJECTMENT.

See DEMAND OF POSSESSION.
—LANDLORD AND TENANT.

Disputed boundary—Evidence of title.—In ejectment the plaintiff claimed the land in his writ as part of lot number six, and defendant defended for it as part of number five. No notices of title were attached to the record. *Held*, that the plaintiff was not bound to prove his title to lot number six. *Cascaden v. Conway*, 598.

ELECTIONS.

See MUNICIPAL CORPORATIONS, 2,
3.—OFFICE, 1.

Contested election—Fees for taking evidence—Action for by commissioner—Recognizance—14 & 15 Vic., ch. 1—20 Vic., ch. 23.]—*Held*, *Burns, J.*, dissenting, that a county court judge acting as commissioner to take evidence in a contested election, under 20 Vic., ch. 23, sec. 6, could not maintain an action for his fees, either against all who petitioned against the return and appeared before him as active parties in the case, or against the one on whose request he acted; but that he was restricted to his remedy under the recognizance. *Burritt v. Hamilton*, et al., 443.

EQUITABLE PLEADINGS.

See INSURANCE, 4.—PRINCIPAL AND SURETY, 3, 4.—SALE OF LAND 1.

EQUITY OF REDEMPTION.

See LANDS.

ESTOPPEL.

1. *Promissory note—Indorser's name signed by the maker—Proof of authority—Asking for time—Estoppel.*]—In an action against the indorser of a note, it appeared that his name had been written by the maker, his nephew, and there was no evidence of express authority; but it was proved that defendant had before and afterwards indorsed for his nephew on purchases by him from these plaintiffs, and that when payment of this note was demanded from him he had asked for time, and had not denied his indorsement until some months afterwards, when the maker had absconded. His excuse was that he kept no memorandum of his indorsements and supposed it was right. *Held*, that defendant had precluded himself by his conduct from disputing his liability; and the jury having found in his favour, a new trial was granted without costs. *Pratt et al. v. Drake*, 27.

2. *Ejectment—Landlord and tenant—Estoppel.*]—The land in question had been granted to the plaintiff's wife, and during her lifetime he had allowed defendant to occupy. She afterwards died without having had children, and the plaintiff brought ejectment. *Held*, that he could not recover, for defendant was not estopped from shewing that the plaintiff's title had not expired. *Robertson v. Bannerman*, 508.

EVIDENCE.

See ABSCONDING DEBTOR, 2.—ACTION 1, 2, 3.—ARBITRATION AND AWARD, 1.—COMMISSION TO EX-

AMINE WITNESSES.—CONTRACT,
3.—EJECTMENT.—ESTOPPEL, 1,
2.—LIMITED PARTNERSHIP.—
MALICIOUS ARREST.—NOTICE TO
PRODUCE.—PARTNERSHIP.—PAT-
ENT.—PRESUMPTIONS.—RECOG-
NIZANCE.—SHIPPING.

1. *Calling witness after case closed.*]

—Where after the close of the plaintiff's case he is allowed to examine the defendant, this does not re-open the matter so as to entitle him to call other witnesses. *Wilkes v. Heaton*, 95.

2. *Promissory note—One joint maker called for the other.*]

—One of two defendants sued as joint makers of a note, who allows judgment to go by default, cannot be called as a witness for the other. *Jordan v. Smith and Patterson*, 590.

EXECUTION.

See ABSCONDING DEBTOR, 1.—AS-
SIGNMENTS, 4.—TRUSTEES.—
LANDS.—PRESUMPTIONS.—PRIN-
CIPAL AND SURETY, 2.—SHERIFF,
1.—SHERIFF'S SALE.

Effect of Executions from a Division Court.]

—See "DIVISION COURT," 2.

Several executions—Right to Poundage.]

—See "POUNDAGE."

FALSE REPRESENTATION.

Of authority to bind Corporation—Action against Agent.]

—See "PRINCIPAL AND AGENT."

FIXTURES.

Mill machinery—Mortgage—Removed for the purpose of repairs—Interpleader—Claimant must shew his right, though execution creditor has none.]

—The execution debtor

mortgaged a grist mill and premises to one B., and this mortgage was assigned to the claimant, but not until after the execution issued. Previous to the execution, however, the debtor had executed a second mortgage to the claimant direct. The machinery of the mill had been disconnected, and taken down to be altered and repaired, *with the intention of replacing it again*, and while thus lying in the mill and on the premises it was seized under an execution against the mortgagor. *Held*, that the machinery, under the circumstances, could not be treated as chattels, and that the claimant was therefore entitled to recover.

The question on an interpleader issue is not whether the execution creditor had a right to seize the goods under his writ, but whether the plaintiff had such an interest in them as entitled him to resist the seizure. Under the first mortgage in this case, therefore, the claimant could not have recovered, although the goods were not subject to execution, because it was not assigned to him until after the seizure; but, *held*, that the second mortgage, being made to him before, removed the difficulty. *Grant v. Wilson et al.*, 144.

FORMER RECOVERY.

See GREAT WESTERN R. W. CO., 2.

FRAUD.

See ABSCONDING DEBTOR, 3.—AS-
SIGNMENTS 1, 3, 4.—BILLS OF EX-
CHANGE AND PROMISSORY NOTES,
2.—PRESUMPTIONS.

GRANT.

See PATENT.

GREAT WESTERN RAILWAY COMPANY.

1. *Work performed beyond their charter—Right to recover—Agreement with Preston and Berlin R. W. Co.—Want of corporate Seal—Partnership.*]—The defendants being unable to finish their railway, and the plaintiffs desiring to have it in operation as a feeder to their line, a correspondence was had between the two companies and resolutions passed by the plaintiffs, and communicated to defendants, authorising an arrangement by which the plaintiffs should work the road for a certain period and share the profits with defendants. No formal agreement was made, and the terms were not definitely settled, but the plaintiffs went on and completed defendants' line, and ran it for some time at a loss. They then sued defendants for the work done, and for the money expended above the receipts. *Held*, that they could not recover, for as to the first demand, the constructing defendants' road was a matter without the scope of their charter; and as to the second, the agreement relied upon being special in its terms, was invalid for want of a corporate seal. *Semble*, that defendants, under the circumstances, should have been held to have accepted the work done, if there were not the other objection to the plaintiffs' recovery. *Semble*, also, that a valid agreement in the terms of the resolution would not have created a partnership between the parties. *The Great Western Railway Company v. The Preston and Berlin Railway Company*, 477.

2. *Bridge over the Twenty Mile Creek—18 Vic., ch. 176—Former recovery—Limitation of action.*]—*Held*, that after the 18 Vic., ch.

176, the plaintiff could not maintain an action against defendants for unlawfully and wrongfully erecting a bridge across the Twenty Mile Creek, and impeding the navigation, for the statute expressly authorises such erection, and gives only a right to compensation for damage sustained. *Per Burns, J.*, a prior recovery for injury sustained by the erection of the bridge was a bar to this action. *Wismer v. The Great Western Railway Co.*, 510.

3. 16 Vic., ch. 54—*Obligation to keep bridge in repair—Right of action by plaintiff's for neglect—Private injury.*]—*Held*, that the Great Western Railway Company were bound by the 5th section of 16 Vic., ch. 54, to maintain in repair the bridge which it allows them to erect. That bridge forms part of the road leading into the plaintiffs' road. *Held*, that the loss of custom and tolls occasioned to the plaintiff's was not sufficient to enable them to maintain an action against defendants for allowing such bridge to fall out of repair. *Hamilton and Brock Road Company v. The Great Western Railway Company*, 567.

HIGHWAY.

See ROAD.—RAILWAYS AND RAILWAY COMPANIES, 1.—TOLL.

1. *Injury to Highway—Action by Municipality.—Pleading.*]—The plaintiffs, a township municipality, in their declaration alleged that they were proprietors of a certain public road between the fourth and fifth concessions of said township, and complained that the defendants, in constructing their railway so negligently and unskillfully made certain drains that great injury was thereby occasioned to the plaintiffs' said road, and they were compelled

to expend large sums of money in repairing the same. *Held*, 'good, on demurrer, as shewing a special injury to the plaintiffs sufficient to sustain the action; for though as a municipality they were not proprietors of the road, yet it might have been purchased by them from some joint stock company, or otherwise. *The Municipality of Sarnia v. The Great Western Railway Company*, 65.

2. *Indictment against railway company for nuisance in obstructing the highway by improper construction of their road in crossing it—Conviction—Motion for judgment—Practice.*—*The Queen v. The Grand Trunk Railway Company*, 165.

ILLEGALITY.

See OFFICE, 2.

INDICTMENT.

See CRIMINAL LAW.—HIGHWAY, 2.
—OFFICE, 2.—RAILWAYS AND R.
W. COS., 2.

INSOLVENCY.

Insolvent debtor—Promissory note—Effect of discharge.—The plaintiff having made advances for defendant, took his note for the amount, £366, on the 10th of March, payable in three months. On the 19th defendant obtained his final order for discharge under the 8 Vic., ch. 48, the plaintiff being mentioned in his schedule as a creditor for £150. *Held*, that the order was no bar to a recovery on the note, even as to the £150, if included in it. *Greenwood v. Farrell*, 490.

INSPECTION.

Of judgments at Crown office—Right of.—See "CROWN OFFICE."

INSURANCE.

1. *Unjust defence—Defective plea—Amendment refused.*—In an action on a policy of insurance, defendants pleaded a communication opened between the building where the goods insured were and the building adjoining, without notice to them, contrary to one of the conditions of the policy. At the trial it appeared that they had misdescribed the alteration on which they intended to rely, but it was also shewn that such alteration had not in any way caused or contributed to the fire. *Held*, an amendment of the plea was properly refused. *Mackenzie et al. v. Vansickles et al.*—*The Times and Beacon Insurance Co., Garnishees*, 226.

2. *Provisional receipt—Construction of.*—A receipt in the following form: "The Times and Beacon Assurance Company Agent's Office, Brantford, 3rd of February, 1858. Received from Messrs. J. Goodfellow & Co., the sum of \$14, being the premium for an insurance to the amount of \$2,000 on property described in the order of this date, subject to the approval of the board at Kingston, the said party to be considered insured for twenty-one days from the above date, within which time the determination of the board will be notified. If approved a policy will be delivered, otherwise the amount received will be refunded, less the premium for the time so insured." *Held*, not an absolute insurance for twenty one days certain, but that the company might within that period reject the risk and give notice, after which their liability would cease: *Burns, J., dissenting. Goodfellow v. Times and Beacon Assurance Co.*, 411.

3. *Affidavit of loss and magistrate's certificate.*]—*Held*, that the affidavit of loss, and the justice's certificate, set out in this case were clearly not in compliance with the conditions endorsed on the policy, and that the plaintiff therefore could not recover. *Held*, also that mutual insurance companies are not precluded from making such conditions. *Langel v. The Mutual Insurance Company of Prescott*, 524.

4. *Second insurance—Equitable replication—Waiver.*]—To an action on a policy of insurance, defendants pleaded an insurance by the plaintiff with another company, without notice to defendants, or indorsement thereof on their policy, contrary to one of the conditions. The plaintiff replied, on equitable grounds, that he effected the insurance with the defendants through N., their agent, residing at E.: that when he effected the second insurance complained of he had not received the policy from defendants and had no notice or knowledge of the said condition: that as soon as he became aware of it he gave notice to said N. that he had effected the insurance mentioned in the plea and another insurance with the B. A. Co.; and as the insurance mentioned in the plea had been cancelled at the time of giving such notice, the said N. promised to have the insurance with the B. A. Co. endorsed on defendants' policy, and told the plaintiff that it was not necessary to have the other noted, and that defendants' policy would still bind them: that after said notice the defendants made a memorandum on their policy of the insurance with the B. A. Co., and returned said policy to the plaintiff as valid and subsisting; and defendants gave no notice to the plaintiff that they considered said

policy cancelled, because the omission to note the insurance in the plea mentioned arose from the neglect of the defendants and not of the plaintiff: that at the time of the loss the plaintiff had no other insurance except that with the B. A. Co., and by reason of the premises defendants waived the endorsement of the insurance mentioned in the plea. It appeared that the policy was made at the head office in Montreal, on the 5th of June, and sent to N. about ten days before the fire, which took place on the 7th of July, but it remained with him, no being called for by the plaintiff. On the 16th the plaintiff obtained the policy pleaded, but it was cancelled on the 30th. N. was agent also for the B. A. Co., and granted to the plaintiff a policy with that company about the same time as the defendants'. On the 4th of July both those policies were sent to the respective head offices to have each marked on the other, and defendants' consent was noted on the 9th of July, and the policy returned. The agent knew of the policy pleaded before the fire, but not until after it had been cancelled. *Held*, that the replication was not proved, for the omission to note the policy was not owing to the negligence of defendants; they were not aware of it while it existed, and it would have been useless to note it after it had ceased. *Held*, also, that the agent could not have waived the forfeiture. *Held*, also, that the replication should not have been admitted, and might be struck out under the C. L. P. A. sec. 290. *Jacobs v. The Equitable Insurance Company*, 35.

5. *Notice, certificate, and affidavit of loss.*]—One of the conditions in a policy required that the assured should "give immediate notice of

any loss or damage by fire, within fourteen days, to the agent of the Company," and as soon after as possible should deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation, and should also declare on oath or affirmation * * in what manner the buildings were occupied at the time of the loss, and who were the occupants. That they should also produce a certificate under the hand and seal of a magistrate most contiguous to the place of the fire, that he had examined the circumstances, and believed the claimant had without fraud sustained loss to the amount which the magistrate should certify; and until such proofs, declarations and certificates were produced, the loss should not be payable. A fire occurred on the 3rd of July. On the 7th, one of the plaintiffs signed a written notice to defendants (set out in the case), stating the destruction of the mill: that its whole value was \$2,400, and that there was no other insurance; at the foot of which was a certificate, under the hand and seal of a J. P., stating that he had examined several persons on oath in the matter, &c., and that he believed the assured had, without fraud, sustained loss by the fire "to the amount of his insurance and over." On the 10th, one of the plaintiffs received a note from defendants' agent, to say that the papers sent were not in compliance with the policy; and on the 20th, the following notice was sent to him, signed by the plaintiffs:—"Gentlemen,—We hereby notify you that a fire occurred in our premises, on the night of the 3rd of July, by which the following property was destroyed: to wit, a saw-mill, whole value \$2,400. We have not had any other insurance effected on said saw-mill. The above named

sum is the whole value of the subject insured. The property is owned by us. The building was used as a saw-mill only," &c., (adding a short statement of the circumstances attending the fire). At the foot was written, "Sworn and affirmed before me at Galt, this 14th of July, 1858. (Signed.) Theophilus Sampson, J. P.;" and underneath the same justice certified that he had made enquiries, and believed the facts set forth, and that the plaintiffs had, without fraud, sustained loss to the amount therein mentioned. This was not under his seal.

The defendants, by their plea, denied the loss in the usual form, and under it desired to shew that the building had been designedly set fire to. *Held*, that this evidence was rightly rejected, and that an application to add such a plea at the trial was properly refused. *Held*, also, *McLean, J.*, dissenting, that the plaintiffs could not recover, for the condition of the policy above mentioned had not been complied with.

As to the particular objection taken,—*Held*, 1. That the certificate and affidavit were in time; and that it was unnecessary that the notice or affidavit should be given or made by all the owners of the property insured. *Seemle*, that a notice given within fourteen days would be sufficient. 2. Per *Robinson, C. J.*, that the paper sent on the 20th was insufficient, for it could not be treated as an affidavit of the truth of the statements as to the loss, or of any thing more than that the notice was given, *Burns, J.*, dubitante; but *held*, that the omission to state what persons occupied the building at the time of the loss was fatal. 3. *Seemle*,

that the defect in the jurat, in not stating which of the plaintiffs were sworn and which affirmed, would not have been fatal. 4. That both certificates were insufficient, for not stating specifically the amount of the loss; and the second certificate for want of a seal. Mann and Hobson v. The Western Assurance Company, 190.

INTEREST.

Deed of dissolution—Construction of—Computation of interest.—In a deed of dissolution of partnership between plaintiff and defendant, it was recited that the plaintiff had agreed to give up all his interest in the assets, on the defendant satisfying all claims, and paying to him £3080, in liquidation of which amount the plaintiff agreed to take certain stock at a valuation, so far as it would go; the balance, after deducting the value of the said stock, to be paid to the plaintiff in equal amounts, at 3, 6, 9, and 12 months, *with interest from the valuation of the said stock*; and defendant covenanted to pay the plaintiff at the expiration of 3, 6, 9, and 12 months after the valuation, the balance of said £3080, *together with interest*. The valuation was delayed for some time. *Held*, that interest could be claimed only from such valuation, not from the date of the deed of dissolution. Rowe v. Cotton, 533.

INTERPLEADER.

See FIXTURES.

The question on an interpleader issue is not whether the execution creditor had a right to seize the goods under his writ, but whether this plaintiff had such an interest in them as entitled him to resist the

seizure. Grant v. Wilson et al., 144.

JOINT STOCK ROAD COMPANIES.

See TOLL.

JUDGMENTS.

See HIGHWAY, 2.—SALE OF LAND. *Right to search for judgments.*—See "CROWN OFFICE."

Registered against seller of land—Lien for purchase money.—See SALE OF LANDS.

LANDLORD AND TENANT.

See DISTRESS.—ESTOPPEL, 2.—LEASE.

Ejectment for non-payment of rent—Distress—C. L. P. A. sec. 263—Acceptance of rent—Appropriation of payments.—Where the lease expressly provides that it shall be void on non-payment of rent, *whether demanded or not*, the C. L. P. A., sec. 263, does not apply, and in ejectment for the forfeiture there is no necessity to shew a want of distress. *Held*, however, that if it had been otherwise, in this case, on the evidence stated below, absence of distress was sufficiently shewn. Defendant gave a note for the rent due up to the 1st December, 1856. He afterwards obtained a note of the plaintiffs for £28 15s., and being unable to pay his taxes gave it to the bailiff before it fell due, telling him to ask the plaintiff to advance the sum required, and to credit the balance on the then current rent. The plaintiff's clerk advanced the money and took the note, but refused to credit the balance on the rent then accruing.

saying that he would apply it on the previous note given by defendant, which remained unpaid. *Held*, that there had been no acceptance of rent due after December, 1856, so as to waive the forfeiture. *McDonald v. Peck*, 270.

LANDS.

See SHERIFF'S SALE.

Action against administrator—Plene administravit—Replication, lands—Rejoinder—Demurrer.]—Action against an administrator. The defendant pleaded *plene administravit*, to which the plaintiff replied lands. The defendant rejoined that he could not deny but that the intestate died seised of lands; but that his heir at law, for a valuable consideration, conveyed all his interest to defendant: that at and before the death of the intestate one H. held a mortgage on said land to secure the payment of £500, being the full value of said land, and that defendant did, to prevent costs against the estate, and for no other reason, and without any consideration, convey the equity of redemption to said H. *Held*, on demurrer, rejoinder bad. *Levisconte v. Dorland*, 437.

LEASE.

See LANDLORD AND TENANT.

What interest in a lease may be sold by sheriff.]—See SHERIFF'S SALE.

1. *Condition for renewal—Construction of—Arbitration—Submission by cestui que trust—Not binding on trustee.*]—Plaintiff leased to one M. certain premises for twenty-one years, and it was stipulated by the

lease that at the expiration of the term the lessee might retain possession, on condition that within three months a new rent should be ascertained by arbitration; but that if the lessor should desire to resume possession he might do so, on paying the value of the improvements, to be ascertained as therein provided for; and this arrangement was to be made at the end of each term. It was then provided, that if "at the expiration of the next or any subsequent term of twenty-one years, no new ground rent should be ascertained as aforesaid," or if the lessor should not resume possession, then the lessee should continue, "upon payment of the rent last ascertained to be payable." This lease was assigned by M. to defendant, as trustee for one F. At the expiration of the first term of twenty-one years no notice was given, nor new rent fixed; but after the three months had gone by arbitration bonds were entered into by F. and the plaintiff. Defendant appeared and acted for F. at the arbitration, and the arbitrators directed a renewal lease at a sum more than five times the first rent, or that the lessor should pay a certain sum for the improvements. The lessor offered to renew, and notified the lessee, who refused to accept at the new rent; and he then brought ejectment. *Held*, 1. That the plaintiff could not recover, for whether the arbitration was binding upon defendant or not, as to the amount of rent, he was entitled to a new term by the conditions of the lease, and there had been no forfeiture. 2. That defendant was not bound by the award, the submission being only by his *cestui que trust*. 3. Upon the construction of the lease, that the provision last mentioned applied at the end of the *first* term of twenty-

one years, as well as of subsequent terms, and that defendant was therefore entitled to retain possession for another term at the original rent. *McDonell v. Boulton*, 14.

2. *Construction of—Sale of part of the land—Abatement of rent—Right to distrain—Taxes.*]—Plaintiff leased to defendant certain land at a yearly rent of 15s., and the taxes, so that said taxes should not exceed £10 a year, any sum above that to be paid by the lessor; and it was provided that the lessor might sell any part of the farm, making a reasonable deduction from the rent therefor, to be determined by arbitration in case of dispute. The Grand Trunk Railway Company gave notice to defendant that they required a portion of the land, which he conveyed to them after an arbitration as to the price. *Held*, 1st—That the land taken by the company was sold by defendant within the meaning of the lease. 2nd—That the abatement from the rent should not be measured by the interest of the money paid by the railway company, but should be determined by the jury, upon a consideration of the comparative value to the tenant of the land sold, assuming 15s. per acre as the average value of the whole. 3rd—That after the sale the lessor could not distrain without first arranging or offering to arbitrate as to the amount to be deducted. 4th—That there was no ground for claiming any abatement of the taxes from the £10 on account of the sale. *Bickle v. Beatty*, 465.

LIBEL.

See SLANDER.

LIEN.

For purchase money.]—See SALE OF LAND.

LIMITATIONS (STATUTE OF).

Acknowledgment in writing—13 & 14 Vic., ch. 61.]—Defendant, one of three partners who had contracted a debt which was barred by the statute, wrote to his agent that he wished to pay his share of the debts of the firm, and offered the creditors 6s. 8d. in the £, on their giving him a release. Some of the creditors accepted and were paid, but the plaintiff refused and sued for the whole. *Held*, that the letter was not sufficient to take the case out of the statute. *Barnes v. Metcalf and Forbes*, 388.

LIMITED PARTNERSHIP.

Description of the business—Payment by special partner—12 Vic., ch. 75.]—A. and B. formed a limited partnership A. to be the general partner, and B. the special, contributing £750. B. held A's. notes for that sum, which he gave up to A. by way of payment. *Held*, not a payment in money within the statute. *Held*, also, that a description of the business to be carried on as that of "general dealers," was insufficient. *Quare*, whether under a plea of *non fecit* to a note signed by the firm, defendant was entitled to shew a limited partnership; but where he was allowed to do so, *held*, that the plaintiff might, in answer, object to the description of the business; and, *semble*, that he might also object that the special partner had not paid in his share. *Benedict et al v. VanAllen et al.*, 234.

MALICIOUS ARREST.

Production of writ].—In an action for malicious arrest it is necessary to produce or prove the writ, in order to connect defendant with the act. *Patterson v. Morrison*, 130.

MANDAMAS.

See MUNICIPAL CORPORATIONS, 3.
—ONTARIO, SIMCOE, &c. R. W.
CO.—REGISTRAR, 2.

To levy rate for schools—Demand and refusal.].—See COMMON SCHOOLS, 1.

1. *Demand and refusal.*].—Where on an application for a mandamus a demand and refusal were sworn to, and defendant in answer denied the refusal, and alleged that he had always been willing to do what was required, the court granted the writ. *In re. Trustees of Union School Section in Otonabee, &c., v. Casement*, 275.

2. Where any reason is given for the refusal complained of it should be stated in the application for a mandamus. *Municipal Corporation of Vespra, &c., v. Beatty*, 540.

3. In this country there can be no demurrer to a return, the statute allowing it in England, 6 & 7 Vic., ch. 67, not being in force here. *Regina v. Wells*, 545.

MERGER.

See PRINCIPAL AND SURETY, 2.

Promissory note—Confession.].—

A cognovit payable immediately, given by the maker of a note before it fell due, and judgment entered upon it and registered, forms no defence for the endorser. *Bank of Montreal v. Douglas*, 208.

MILL.

See FIXTURES.

MISJOINDER.

See PRACTICE, 2.

MISREPRESENTATION.

Of authority to bind Corporation—Action against agent.].—See PRINCIPAL AND AGENT.

MONEY HAD AND RECEIVED.

Contract—Assignment—Payment by mistake—Money had and received—Trover.].—M. had a contract to supply wood to a railway company, for which he was to be paid when it had been inspected and accepted. While 152 cords were lying in the company's yard for inspection, he assigned all the wood that belonged to him, with other property, to the plaintiff, for the benefit of his creditors. He at the same time made over his interest in the contract to the defendant, who completed it, and the company afterwards by mistake paid defendant for these 152 cords, as well as for what he had himself supplied. *Held*, that the plaintiff might recover that sum as money had and received, but that he could not maintain trover, there having been no conversion by defendant. *Held*, also, that defendant could not object that the assignment to the plaintiff was not properly filed. *Scott v. Kelly*, 306.

MONEY PAID.

See PRINCIPAL AND SURETY, 5.

MORTGAGE.

See CHATTEL MORTGAGE. — FIXTURES. — LANDS. — PRINCIPAL AND SURETY, 2, 5.

MUNICIPAL CORPORATIONS.

See ACTION, 2. — ARBITRATION AND AWARD, 1, 3. — BY-LAW. — COMMON SCHOOLS. — HIGHWAY. — SHERIFF, 2.

1. Municipality of Wellington and Wilmot—Debt for Guelph and Dundas road—Liability of Wilmot—Right of action—Award under 14 & 15 Vic., ch. 5, sec. 7—Effect of upon provisions of sec. 8.]—The Municipal Council of the Township of Wellington v. The Municipality of the Township of Wilmot, 71.

2. *Assessors—Appointment of—Quo Warranto.*]—The council by resolution appointed one B. assessor, who was sworn into office, and made an assessment. This appointment was made by a vote of three against two. The election of one of the three was afterwards set aside, and by a subsequent vote the resolution was rescinded, and a by-law passed, appointing another assessor. Both made assessments, and much confusion arose. Under these circumstances, the court granted a *quo warranto* to determine the validity of the last appointment.—In re McPherson and Beeman, 99.

3. *Contested election—Delay in taking the declaration—New election—Refusal to act—Mandamus*—22 Vic., ch. 99, secs. 122, 124, 130, 183.]—Five township councillors were elected at the general election in January. At their first meeting, on the 17th, only one made the declaration of qualification, and a doubt having been raised as to the other four in consequence of some em-

ployment held by them under the corporation, they delayed in order to consult the county court judge. On the 19th they met again and organized themselves, but on the same day the reeve for the previous year issued his warrant to elect four other councillors, who were returned; and on the 31st these four, with the man who had first qualified, met and claimed to be the council. *Held*, that the second election was invalid, for the parties first elected not having *refused* to qualify, but only delayed, and having done so within the twenty days allowed, there was no ground for a new election. A mandamus was ordered to the clerk to deliver up the papers to the council first chosen. In the Matter of the Corporation of Ashpodel and Sargent et al., 593.

NEGLIGENCE.

See ACTION, 1, 3.

NEW TRIAL.

See CRIMINAL LAW, 1. 2.—PRESUMPTIONS.—RAILWAYS AND R. W. COS., 2.

Practice—Several issues—New trial.]—Where defendant has a verdict against him on some issues, and in his favour on others, the court will not on his application grant a new trial on the former only. Elwood v. Cameron, 528.

NISI PRIUS.

Practice at—Calling witnesses after case closes.]—See EVIDENCE.

Striking out one of several defendants.]—See "PRACTICE, 2."

Unjust defence—Amendment refused at.]—See "INSURANCE, 1."

Application to strike out names of two defendants to call them as witnesses for the third.—See "PRINCIPAL AND SURETY, 2."

NOTICE OF ACTION.

Division court—Want of seal to warrant.—The provisions as to notice of action in 13 & 14 Vic., ch. 53, sec. 107, are repealed by the 14 & 15 Vic., ch. 54. Bailiffs of a division court are entitled to notice of action for seizing goods, although acting under a warrant without seal. *Anderson v. Grace and Beal*, 96.

NOTICE OF NON-PAYMENT.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES.—DIVISION COURT*, 1.

NOTICE TO PRODUCE.

An affidavit of service of notice to produce is not admissible under Common Law Procedure Act, sec. 167, unless made by the plaintiff's attorney or his clerk. *Quære*—whether service of such notice on a female servant at the office and residence of defendant's attorney is sufficient, *Patterson v. Morrison*, 130.

NUISANCE.

See *HIGHWAY*, 2.—*RAILWAYS AND RAILWAY COS.*, 2.

OFFICE.

22 Vic., ch. 22—Change of office—Re-election.—Defendant, while a member of parliament, was appointed to the office of Postmaster-General, and again re-elected for

the same constituency. On the 29th of July he resigned that office, and within a month, viz., on the 6th of August, was appointed President of the Council, which office he resigned on the same day, and on the next day was re-appointed to his old office of Postmaster-General. *Held*, that he was authorized by the 22 Vic., in taking this course, and not subject to any penalty. The penalties imposed by that act apply to members of the assembly retaining their seats without re-election after acceptance of office, and not only to persons absolutely ineligible. The exemption contained in the seventh clause is not confined to one resignation and acceptance of office, but allows the change to be repeated, and the person may thus go back to the same office which he first resigned. It was stated in the pleadings that the ministry, of which defendant as Postmaster-General was a member, all resigned office on the 29th of July, and on the 2nd of August were succeeded by the opposition, who resigned on the following day: that on the 6th the old ministry were re-appointed, but took different offices from those which they before held, and on the 7th resigned again and were re-appointed to their old places; and it was alleged that the appointment to a different office in the first instance was colourable and made only to enable defendant to resume his original appointment without going back for re-election. *Held*, that although such a proceeding was probably not contemplated by the act, it was allowed by it; that the court could not look at defendant's motives, or strain the construction of the statute so as to impose a penalty; and that whether the course taken was or was not consistent with the system of political government estab-

lished in this province, was a question which they could not take into consideration. *McDonell v. Smith*, 310.

2. *Sale of office—Information—5 & 6 Ed. VI., ch. 26; 49 Geo. III., ch. 126.—Scire Facias.*]—The statute 5 & 6 Ed. VI., against buying and selling of offices, is in force in this country under the 40 Geo. III., ch. 1, as part of the criminal law of England. Any act done in contravention of that statute is indictable, though not especially made so. *Quære*, per *Robinson, C. J.*, whether it is also introduced by the 32 Geo. III., ch. 1, which adopts the law of England, “in all matters of controversy relative to property and civil rights.” The 49 Geo. III., ch. 126, clearly extends the 5 & 6 Ed. VI., to Upper Canada, and to the office of sheriff—*Foot v. Bullock*, 4 U. C. R. 480, confirmed. The defendant agreed with R., then sheriff of the County of Norfolk, to give him £500, and an annuity of £300 a year, if he would resign; R. accordingly placed his resignation in defendant’s hands; the £500 was paid, and certain lands conveyed to secure the annuity; and it was further agreed, that in the event of the resignation being returned, and R. continued to hold the office, the money should be repaid, and the land reconveyed, but R. did not undertake in any way to assist in procuring the appointment for defendant. The defendant having been appointed by the government in ignorance of this agreement, an information was filed against him, and *Sci. Fa.* brought to cancel his patent. *Held*, that this was an illegal transaction, within the 5 & 6 Ed. VI., and that an information might be sustained under that act without reference to the 49 Geo. III., which clearly prohibited and

made it a misdemeanor. *Semble*, that the agreement would also have been an offence at common law. The ignorance of the government, which was averred in the information, as to the illegal agreement, was immaterial. *Regina v. Mercer*, 601.

OMISSION.

Of the sum, in recital of appeal bond.]

—See APPEAL, 2.

To fill up schedule to assessment.]

See ASSIGNMENTS, 2.

ONTARIO, SIMCOE AND HURON R. R. CO.

12 Vic., ch. 196, sec. 35—*Refusal to register transfer of stock—Mandamus.*]—*Held*, that under 12 Vic., ch. 196, sec. 35, the clerk of the Ontario Simcoe and Huron Railway Co. could not refuse to register a transfer of stock from one municipal corporation to another on the ground that no by-law had been passed sanctioning such transfer. The Municipal Corporation of *Vespra* and *Sunnidale v. Beatty*, 540.

OWNERSHIP.

Evidence of ownership of wharf by defendants.]—See ACTION, 1.

Of vessel—Proof of.]—See SHIPPING.

PARTNERSHIP.

See ARBITRATION AND AWARD, 2.—
GREAT WESTERN R. W. CO., 1.—
INTEREST—LIMITED PARTNERSHIP.

Held, that on the evidence in this case, the jury were justified in finding defendants to be liable as part-

ners, notwithstanding the proof of a dissolution. *Jordan v. Smith et al.*, 590.

PATENT (GRANTING LAND).

See VARIANCE.

A certified copy of a patent taken from the books in the provincial registrar's office, and signed by the deputy-registrar, is not sufficient as primary evidence instead of an exemplification. *Prince v. McLean*, 463.

PAYMENTS.

See LIMITED PARTNERSHIP.

Appropriation of.—See LANDLORD AND TANANT.

By mistake.—See MONEY HAD AND RECEIVED.

Over-payments on building agreement—Set off.]—See SET OFF.

PLEADING.

See ACTION, 3.—ACCORD AND SATISFACTION. — ARBITRATION AND AWARD, 2.—ASSESSMENTS, 4.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.—BUFFALO AND LAKE HURON R. W. Co.—DOWER, 2.—INSURANCE, 4. — LANDS. — PRACTICE, 1. — PRINCIPAL AND SURETY, 1, 2, 3.—SLANDER.

POSSESSION.

Actual and Continued change of.—See ASSIGNMENTS, 1, 3.

POUNDAGE.

Several executions improperly enforced—Right to poundage on each—Attorney ordered to pay—9 Vic., ch. 56, construction of.—Defendants, a banking company, carrying on business at different places in the

province, were sued by the plaintiff on a contract, and at the assizes a verdict was taken subject to arbitration. An award was made in vacation, giving a large sum to the plaintiff, for which he entered judgment and issued execution to the sheriff of Hastings. Defendants moved in chambers to stay proceedings until term, but the application was refused. The plaintiff's attorney then issued two other executions, to the sheriffs of Northumberland and Peterborough, and instructed proceedings to be continued on the first writ, the avowed object being to obtain the money before term, when defendants intended to move against the award. Defendants had an agency in each county, and all the writs being earnestly pressed, their books and papers, to the value of the debt and poundage, about £1,200, were seized at the three places. *Held*, there being no ground for apprehension of losing the debt, that the conduct of the attorney in issuing and enforcing the three writs was improper, and that his client's instructions could form no justification. The court therefore ordered him at once to refund to defendants the poundage retained by two of the sheriffs, and to pay the costs of the executions directed to them, and of this application. *Semble*, that under the facts, which are more fully set out in the case, these sheriffs were not strictly entitled to poundage.

Where money levied has to be restored to defendant, in consequence of some thing for which the plaintiff is answerable, the sheriff may recover his poundage from the plaintiff. *Quære*, whether the same principle applies when the sheriff is entitled only to compensation for his services under 9 Vic., ch. 56, or whether defendant

must pay in all such cases. *Henry v. The Commercial Bank of Canada*, 104.

PRACTICE.

See AFFIDAVITS.—AMENDMENT.—

APPEAL.—BY-LAW, 1.—CERTIORARI.—COMMISSION TO EXAMINE WITNESSES—CRIMINAL LAW, 1, 2.—DEMURRER.—DIVISION COURT.—DOWER, 1.—EVIDENCE.—HIGHWAY, 2.—INSURANCE, 1, 4.—MANDAMUS.—NEW TRIAL.—NOTICE OF ACTION.—NOTICE TO PRODUCE.—PRINCIPAL AND SURETY, 2.—RAILWAYS AND R. W. COS., 2.—REPLEVIN.—SET OFF.

Bill of Exchange—Issuable plea—Practice.—To an action on a bill of exchange by a remote endorsee, alleging the prior indorsements, against the drawer and acceptor, the latter being under terms to plead issuably, pleaded that he was induced to accept by the fraud, covin, and misrepresentation of the drawer and indorsers, and without any consideration or value being given to him for his acceptance, and that the last indorser indorsed to the plaintiffs without any consideration or value being given by the plaintiffs to said indorser. The plaintiffs signed judgment, treating the plea as not issuable, and on application in chambers, which was supported by an affidavit of merits, the judgment was set aside for irregularity with costs, the learned judge holding the plea to be issuable. The plaintiff then moved to rescind this order. The court refused to interfere, because as merits had been sworn to in chambers, it was right at all events to relieve defendants from the judgment, and the only question was therefore one of costs. *Quære* whether the plea was issuable or not. *The Bank of Montreal v. Cameron et al.*, 46.

2. *Quære*, whether one of several defendants may not be struck out at the trial without his consent or that of those remaining. *Burritt v. Hamilton et al.*, 443.

PRESUMPTIONS.

Presumption of deed—Evidence—Confession given by administratrix—Sale under it of testator's land—Purchase by her—Fi. fa. goods not shewn.—Ejectment. The plaintiff claimed under the grandson and heir at law of the patentee, Francis Drouillard; defendant under his second son, Dennis, to whom it was alleged that he had conveyed. The patent was for 1200 acres, including the land in question. The heir-at-law who conveyed to the plaintiffs, was living in the State of Michigan, and appeared to have believed he had no title when the plaintiffs purchased from him there his right for a small consideration. For the defendant it was proved that it was always understood in the family of the patentee that Dennis owned this land: that Dennis had lent his father money, who had been heard to say that he had given him this land for the debt, if he could not pay: that he afterwards said that he could not: and he and Dennis went together to the land, that his father might put him in possession; and on their return the father said he was relieved from the debt, having given Dennis the land. This was before 1812. The eldest son of the patentee had never set up any claim, knowing as his brother swore, that Dennis owned the land. Dennis devised this, with other land, among his children, who by partition conveyed it to one of them, James, who afterwards devised to his brother Richard. Richard died, and his land was sold

under a judgment obtained against Catharine, his wife, on a confession given by her as his administratrix, and was purchased by her at the sale, and conveyed to the defendant; Catharine and her second husband, M., first went on the land in 1836, and defendant and his father had held it since. The plaintiffs had also taken a conveyance from the heirs of Dennis. *Held, Burns, J.*, dissenting, that there was sufficient evidence to leave to the jury on which to presume a conveyance by the patentee to Dennis, and that having found for defendant their verdict should not be disturbed. *Held*, also, that the fact of Catharine being administratrix could not be impeached so long as the letters of administration granted to her remained in force. That she could legally give the confession she did, and purchase under the judgment obtained on it against herself, though it might furnish grounds for suspicion of fraud; and that the fact that the writ against lands appeared by the deed to have issued on the same day as that against goods was no objection. *Eades and Bratt v. Maxwell*, 173.

PRINCIPAL AND AGENT.

See ESTOPPEL, 1.

Representation as to authority to bind corporation—Want of corporate seal—Evidence.]—An agreement was made between the plaintiffs, of the one part, and "The Great Western Railway by their agent," of the other part, by which the plaintiffs contracted to furnish a large quantity of cordwood on the terms specified. The agreement was signed and sealed by the plaintiffs, and by defendant, styling himself "agent." No representation

as to authority was shewn to have been made by defendant, but it was proved that after the company had accepted and paid for a portion of the wood they refused to carry out the contract, and defeated the plaintiffs in an action brought upon it by setting up the want of their corporate seal. *Held*, that this evidence was insufficient to sustain an action against defendant for falsely representing to the plaintiffs that he had authority to bind the company. *McDonald et al. v. McMillan*, 377.

PRINCIPAL AND SURETY.

See MERGER.—SHERIFF, 2.

1. *Bond—Plea of time given to surety—Demurrer.*]—Declaration against defendant on a bond conditioned for the payment of money by one R. *Plea*, that defendant was surety for R., as the plaintiff well knew: that the time for payment had elapsed: and that the plaintiff without the knowledge or consent of defendant, agreed with R. to give him time for one year, in consideration of certain usurious interests paid by him. *Held*, on demurrer, plea clearly no defence. *Corrigal et al. v. Boulton*, 131.

2. *Joint sureties—Mortgage by one—Judgment by default—Right to call co-defendant—C. L. P. Act, Sec. 66—Practice.*]—The plaintiff sued defendants, H. M. & S., as joint makers of a note. H. & M. did not appear, and judgment was signed by mistake against all, but afterwards set aside as against S., who pleaded 1. A mortgage given for the same money by M., M. and S. being sureties for H. 2. That a judgment had been obtained in this suit against all three defendants, and set aside as against S., but under the *fi. fa.* sued out upon it

the sheriff had seized goods of H. & M. *more than sufficient to satisfy the judgment* and costs, and that he had made thereout £50, and still held the rest of the goods, out of which he could make the residue. *Held*—1. That the giving a mortgage by M., one of two sureties, did not of itself discharge S., the other surety. 2. That an application to strike out the names of H. & M. from the record, so that they might be called as witnesses for S., was properly refused. 3. That the second plea was not supported, the evidence being that all the goods seized brought only £9 at the sale. *Quære*, whether the plea formed a good defence. 4. That if by taking judgment against the defendants not appearing, the plaintiffs, under C. L. P. A., sec. 66, had lost their remedy against S., that objection could not be taken at the trial, but the proper course was to move to stay proceedings. *Seemle*, however, that the plaintiff had not *elected* within the meaning of that clause to proceed against the others separately, the judgment against Shaw having been set aside. *Kerr et al. v. Hereford et al.*, 158.

3. *Promissory note—One maker surety for others—Time given—Equitable defence.*]—Action on a promissory note made by defendants payable to T. or bearer, and by her delivered to plaintiffs. *Plea*, on equitable grounds, by one of the defendants, M., that he made the note as a surety for the others: that after it became due, T., in consideration of a certain sum paid to her, gave time to them without his, M.'s consent; and that the plaintiff took the note after it became due, and with knowledge of the premises, *Held*, good. *Parley v. Loney et al.* 279.

4. *Promissory note—Giving time to surety—Equitable defence.*]—Action on a promissory note made by defendant payable to W. or bearer, and by him delivered to plaintiff. *Plea*, on equitable grounds, that the note was made by defendant as surety, jointly and severally with one C., to secure a debt due from C. to W., as W. well knew; that W. transferred to the plaintiff, after it became due, and without consideration; and that W., after it fell due, and before the transfer, and the plaintiff after such transfer, and without defendant's consent *gave time* to C. to the prejudice of the defendant. *Held*, no defence. *Thompson v. McDonald*, 304.

5. *Money paid.*]—H. had leased to defendant certain premises, the plaintiff becoming his surety for the rent. Defendant being in arrear the three met, and it was agreed that the lease should be given up; that the plaintiff should secure H. by Mortgage for the amount due; and that H. should release defendant. The mortgage was executed, and H. gave a receipt to the plaintiff for the sum secured. Before the mortgage fell due or had been satisfied, the plaintiff sued defendant as for money paid, and the jury found that the mortgage was received in satisfaction of defendant's debt with his assent. *Held*, that the action would lie. *McVicar v. Royce*, 529.

PROHIBITION.

See DIVISION COURT, 1.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC RECORDS.

Right to search for judgments at Crown Office.—See "CROWN OFFICE."

QUO WARRANTO.

See MUNICIPAL CORPORATIONS, 2.

RAILWAYS AND RAILWAY COMPANIES.

See ASSESSMENTS, 1.—BUFFALO AND LAKE HURON R. W. Co.—GREAT WESTERN R. W. Co.—HIGHWAY, 2.

1. 20 Vic., ch. 12—*Construction of—Horse killed on railway.*—The plaintiff, as constable, seized a horse under a distress warrant, and put him in the stable of an inn. The horse escaped to the road, and having got upon the railway owing to defects in the cattle guards, was killed at some distance from the point of intersection. *Held*, that under the 20 Vic., ch. 12, the horse was unlawfully upon the highway, and having got thence upon the track, the company were not responsible, notwithstanding the defect in the cattle-guards. *Held*, also, that although the horse was upon the road without the plaintiff's knowledge or permission, yet he was, nevertheless, there unlawfully, for the statute obliged the plaintiff to prevent him from being there.—*Seem*, that the statute does not take away the right of action in these cases only where the animal is killed at the very point of intersection. *Seem*, also, that the plaintiff had sufficient property in the horse to entitle him to sue. *Simpson v. The Great Western Railway Company*, 57.

2. Indictment against railway company for nuisance in obstruct-

ing the highway by improper construction of their road in crossing it. Conviction. Motion for judgment. Practice. *Regina v. Grand Trunk R. W. Co.*, 165.

3. *Refusal to pay fare—Action for putting plaintiff off the train*—14 & 15 Vic., ch. 51, sec. 21, sub-sec. 6.]—The plaintiff got upon the train without a ticket, and when asked for his fare declined paying then, as he said he had not made up his mind how far he should go. Defendant, the conductor, said he must decide, and afterwards, on his declining again on the same ground, stopped the train and put him out, at a place about a mile and a quarter from the last station, and within half a mile of a house. The plaintiff at the last tendered a \$20 gold piece, telling the conductor to take his fare, \$1.35, out of it. *Held*, that the plaintiff had refused to pay his fare, within the meaning of the 14 & 15 Vic., ch. 51, sec. 21, sub-sec. 6, and that defendant was justified in what he did; and the jury having found for the plaintiff, a new trial was granted without costs. *Fulton v. The Grand Trunk Railway Company*, 428.

RECOGNIZANCE.

See ELECTIONS.

Recognizance to keep the peace.—Proof of breach—What amounts to an assault—Conviction by magistrates—4 & 5 Vic., ch. 27.]—*Sci. fa.* upon a recognizance to keep the peace and be of good behaviour towards her Majesty and all her liege subjects, and especially towards H. M., charging an assault and breach of the peace. For the Crown a judgment of the court of Quarter Sessions was proved, affirming a conviction of defendant

before magistrates on a charge of assaulting H. M. "by using insulting and abusive language to him in his own office, and on the public street, and by using his fist in a threatening and menacing manner to the face and head of said H. M."

Held, sufficient proof of a breach of the peace. *Held*, also, that defendant was properly convicted, for the offence charged amounted to an assault. *Held*, also, on demurrer, (page 558) that the conviction and payment of the fine formed no bar to this proceeding on the recognizance. *Regina v. Harmer*, 555.

REGISTRAR.

1. *Registrar's Fees.*—Where a township lot has been originally granted by the Crown in halves, and the title to each has continued separate, the registrar must, on application furnish an extract of conveyances relating to either half; he cannot furnish and charge for extracts of conveyances relating to the other part. He is entitled to charge only 1s. 3d. for the first 100 words, and 9d. for each additional 100 words contained in the whole extract and certificate; not 1s. 3d. for each memorial, treating it as a separate extract and certificate. *Hope v. Ferguson*, 219.

2. When a separate registry office is established in a city or town, the books which have been kept for it must be delivered to the registrar, and it is no excuse for not doing so that memorials relating to land without the city have been improperly entered in such books. *The Registrar of the City of London and the Registrar of the County of Middlesex*, 382.

RELEASE.

Provision for, in assignment in trust for creditors—Effect of. — See ASSIGNMENTS, 3. 4.

RENT.

See DISTRESS. — LANDLORD AND TENANT.—LEASE.

REPLEVIN.

Right to recover for part.—In replevin under 14 & 15 Vic., ch. 64, the verdict is divisible, so that the plaintiff may recover for whatever part of the goods he proves himself entitled to, and defendant for the rest. "From lots 1 to 13" excludes both 1 and 13. *Haggart v. Kernahan*, 341.

2. *Part of the goods not replevied—Right to damages.*—In replevin for a cow and calf it appeared that the calf only had been replevied under the writ, as the cow could not be found, but the plaintiff proved his right to both. *Held*, that he was entitled to recover the value of the cow. *Rolson v. Lawson*, 494.

ROAD.

See ARBITRATION AND AWARD, 1, 3. —BY-LAW, 1. — GREAT WESTERN R. W. Co., 3. — HIGHWAY.—TOLL.

SALE OF GOODS.

See ASSIGNMENTS.

SALE OF LANDS.

See LEASE, 2. — PRESUMPTIONS. — SHERIFF'S SALE.—TAXES.

Lien for purchase money—Judg-

ments against seller—Equitable defence.—To an action for the purchase money of land sold and conveyed, defendant pleaded, by way of equitable defence, that the plaintiff retained a lien on the land in equity for the price, and had an interest by reason of such lien, which might be bound by judgments; and that two judgments had been recorded against the plaintiff and remained unpaid, for an amount exceeding that sued for. *Held*, on demurrer, no defence. *Shaw v. Ross*, 257.

Lease—Deduction to be made from rent in event of sale—Land taken by R. W. Co.—Whether a sale within the meaning of the lease.—See LEASE, 2.

SALE OF OFFICES.

See OFFICE, 2.

SCHEDULE.

See ASSIGNMENTS, 2.

SCHOOLS.

See COMMON SCHOOLS.

SEAL.

See BY-LAW, 2.—GREAT WESTERN R. W. Co., 1.—INSURANCE, 5.—NOTICE OF ACTION.—PRINCIPAL AND AGENT.

SERVICE.

Of Notice to produce.—See NOTICE TO PRODUCE.

SET-OFF.

Building agreement. — Over-payment—Set-off—Amendment.—In an

action on a building agreement, defendants pleaded a set-off *equal to the plaintiff's claim*, for money had, received, &c., and it appeared that they had in fact over-paid the plaintiffs for the work. The jury found a verdict in defendants' favour for the excess, contrary to the judge's charge. The court refused to amend the plea, so as to claim the sum given, 1st, because such an amendment could not properly be granted, at least without a new trial; and 2ndly, because the amount over-paid would not form the subject of a set-off. *Sinclair and Burrows v. The Town Council of the Town of Galt*, 259.

SHERIFF.

See ABSCONDING DEBTOR, 1.—ASSIGNMENT OF DEBTS.—OFFICE, 2.—SHERIFF'S SALE.

1. It appeared that the plaintiffs' attorney in the execution had directed the sheriff not to sell the goods of L., but to levy upon another defendant in the suit: that that defendant having remonstrated and urged him to sell, he telegraphed to the attorney to know if he should do so, and in answer was told that he must act as he thought fit, according to his own judgment. *Held*, that this answer was an abandonment of the first direction. *Quære*, however, whether the plaintiffs could have sustained an action against the sheriff for disobeying such instructions, they not being parties to the suit. *Boulton et al., v. Smith*, 401.

2. *Surities for sheriff of united counties.—Dissolution of Union, effect of—Duration of covenant—3 W. IV., ch. 8, 4 & 5 Vic., ch. 91, 12 Vic., ch. 78.*—*Held*, BURNS, J., dissenting, that the sureties for a sheriff as

sheriff of the United Counties of Middlesex and Elgin, were not liable for him as sheriff of Middlesex only after the union had been dissolved. *Held*, also, that under 3 W. IV., ch. 8, and 4 & 5 Vic., ch. 91, taken together, the covenants given by such sureties are not necessarily limited in duration to four years. *Thompson et. al., v. McLean et. al., 495.*

SHERIFF'S DEED.

Not made until assignment by debtor.—See "SHERIFF'S SALE."

SHERIFF'S SALE.

See TAXES.

1. *Description of land advertised inconsistent with land sold—Effect of advertisement—Assignment by Debtor between the sale and conveyance—What interest in a lease may be sold by sheriff.*—The sheriff under a *fi. fa.* against one Simpson advertised for sale all his right, title and interest, in and to a certain unexpired lease of the premises now occupied by Kemp as a livery stable, on Main street, between James and Hughson streets. (Main street ran east and west, James and Hughson streets north and south.) At the time of the advertisement Kemp was no longer living on any part of the land so leased, but he had occupied a piece of about thirty feet frontage, out of eighty feet which the lease covered. At the sale, as the weight of evidence shewed, and the jury found, the sheriff sold all Simpson's interest in the lease, it being his impression that it covered eighty feet, and that Kemp was in possession of the whole. A few days afterwards, finding that there was a dispute as to what had been sold,

the sheriff advertised another sale of all the remaining interest of S. in the lease; but, having taken advice, he abandoned this sale, and afterwards conveyed to defendant, the purchaser at the sale, all the term of S. in the premises mentioned in the lease. In the meantime, however, S., assuming that only what Kemp was formerly in possession of had been or could be sold under the advertisement, conveyed to the defendant all the land mentioned in the lease, except that; and the plaintiff brought trespass against the defendant, who claimed the whole of the land leased under the sheriff's sale and conveyance. The jury found for defendant. *Held*, that it was properly left to the jury, on evidence of what took place at the sale, to say what land was actually sold: that it was the sale, not the advertisement, which must govern; and that the second advertisement could have no legal effect. If the advertisement had clearly referred only to what Kemp was then occupying (which it was held not to do) but the sheriff had put up and sold the whole interest under the lease, the lease, and not the advertisement, would still have governed, for the sheriff's advertisement cannot be treated as an auctioneer's printed terms of sale in ordinary transactions. His power to convey depends upon what the debtor owns, and what he actually sells, not on the accuracy of his advertisement.—*Held*, also, that it was immaterial that the sheriff's deed was not made until after the debtor had assigned to the plaintiff's, it being part of the execution. The sheriff under a *fi. fa.* may sell what the termor continues to hold under the lease, but he cannot sell a part of his interest, or a part of the premises. *Osborne et. al. v. Kerr, 134.*

2. *Sale of land for taxes—Measurement of part sold.—Inconsistent description.*—See TAXES.

SHIPPING.

See ASSIGNMENT OF DEBTS.

Action for goods supplied to vessels—Proof of ownership.—In an action against several defendants for wood furnished to a steamer, the proof of ownership consisted of parol evidence that one defendant had taken stock in the vessel, and paid for it, and had represented several stockholders at a meeting held after she had been lost. A certificate was also produced, signed by the collector of customs, stating the names of the registered owners, and the number of their shares. *Held*, insufficient. *Quere*, whether the certificate was admissible in evidence under the 16 Vic., ch. 19. *Lynch v. Shaw et. al.*, 241.

SLANDER.

Pleading.—To an action for slander, in saying of the plaintiff "I am told that Muma was the man that killed the pedlar, and I believe it," defendant pleaded that he was told that the plaintiff was the man that killed the pedlar, and he did believe it. *Held*, insufficient.—*Muma v. Harmer*, 293.

STATUTES (CONSTRUCTION OF.)

5 & 6 Ed. VI, ch. 16.—See Office, 2.
32 Geo. III., ch. 1. ————
49 Geo. III., ch. 126. ————
6 Geo. IV., ch. 7.—See Taxes
3 Wm. IV., ch. 8.—See Sheriff, 2
4 & 5 Vic., ch. 27.—See Recognizance.
———ch. 91.—See Sheriff, 2.
8 Vic., ch. 13.—See Appeal, 1, 3.
9 Vic., ch. 56. See Poundage.

12 Vic., ch. 75.—See Limited Partnership.

———ch. 78.—See Sheriff, 2

———ch. 196, sec. 35.—See Ontario, Simcoe, &c., R. W. Co.

13 & 14 Vic., ch. 53, sec. 23.—See Division Court, 1.

———ch. 58.—See Dower.

———ch. 61.—See Limitations (Statute of)

14 & 15 Vic., ch. 1.—See Elections.

———ch. 5.—See Municipal Corporations, 1.

———ch. 51, sec. 21, sub-sec. 6.—See Railways and Railway Cos., 3.

———ch. 64.—See Replevin.

16 Vic., ch. 19.—See Action, 2.—Shipping.

———ch. 54.—See Great Western R. W. Co., 3.

———ch. 181, sec. 33.—See Arbitration and Award, 3.

———ch. 182.—See Assessments, 1 2, 3.

———ch. 190.—See Toll.

18 Vic., chap. 176.—See Great Western R. W. Co., 1.

19 Vic., ch. 21.—See Buffalo and Lake Huron R. W. Co.

———ch. 43 (Common Law Procedure Act, 1856) secs. 53, 55.—See Absconding Debtor.

———secs. 68, 70.—See Practice.

———sec. 167.—See Notice to Produce.

———sec. 263.—See Landlord and Tenant.

20 Vic., ch. 3. ———— See Assignment, 1, 3.—Chattel Mortgage.

———ch. 12.—See Railways and R. W. Cos., 1.

———ch. 22. ———— See Office.

———ch. 23, sec. 6, ———— See Elections.

———ch. 61. ———— See Criminal Law.

STATUTE OF LIMITATIONS.

See LIMITATIONS (Statute of.)

SURETY.

See PRINCIPAL AND SURETY.

TAXES.

See ASSESSMENTS. — DISTRESS. —
LEASE, 2.

6 Geo. IV., ch. 7. sec. 13.—*Sale of lands for taxes.—Measurement of part sold—Inconsistent descriptions.*]

—The lot in question, fronting to the north was bounded on the south by the river Thames. The sheriff, while the 6 Geo. IV., ch. 7, was in force, sold 120 acres of the lot for taxes, and in his deed first gave a description by metes and bounds, which was not in accordance with the statute, and then added a general description of the land, as being 120 acres, measured in the manner prescribed by the act. *Held*, that the latter description must govern. *Held*, also, that according to the statute the rear line of the tract sold should correspond with the rear of the whole lot, following the windings of the river. *McIntyre v. The Great Western Railway Company*, 118.

TITLE.

See EJECTMENT.—ESTOPPEL. 2.

TOLL.

Road Companies — Bridges — Right to toll—Transverse road—16 Vic., ch. 190, secs. 30, 31.—The Wortley road runs north, and intersects the London and Port Stanley Plank road within less than 100 yards of the eastern end of that road, where it enters the town of London after crossing the Westminster bridge over the Thames, the continuation easterly forming York Street. The plaintiff living on the Wortley road, thus travelled, in going into London, over less than 100 yards of the London and Port

Stanley road, including the bridge. The London and Port Stanley road had been purchased by the County of Middlesex from the Government. *Held*, that under the proviso to section 31 of 16 vic., ch. 190, he was exempt from toll, and that the county could not impose a charge for passing the bridge alone. *Semble*, that the county in this case owning the road, could not impose a higher rate for crossing the bridge under section 30, which allows that to be done by road companies under the sanction of the council. *Wilson v. Groves*, 419.

TROVER.

See MONEY HAD AND RECEIVED.

TRUSTEES.

See LEASE. 1.

Liability of for taxes.—See ASSESSMENTS, 3.

VARIANCE.

See INSURANCE, 1.

Difference of name—Identity.—The patent for land issued to Michael Corrigan, and the name was so spelt in the deed from him under which the plaintiff claimed, but was signed Michael Corgan. *Held*, no variance. *Prince v. McLean*, 463.

VERDICT.

Divisible in replevin.—See REPLEVIN, 1.

WAIVER.

See CERTIORARI. — COMMISSION TO EXAMINE WITNESSES. — INSURANCE, 4.—LANDLORD AND TENANT.

WILL.

Construction of.—Boundary.]—A. devised to defendant “that 100 acres which he now occupies, being No. 26 only, and that he is not to occupy or use that part or strip of said lot on the east side of the stone fence which is now a divisional line between his farm and mine, and that that stone fence is to be considered a boundary line, and to be continued all through between the two farms.” The stone fence, it appeared, if continued, would cross the division line between 25

and 26, and cut off a triangular piece of 25 at the north-west corner of that lot. *Held*, that defendant was entitled to that piece, being on the west side of the stone fence, although not part of lot 26. *McDonald v. McPhail*, 299.

WITNESS.

See ACTION, 2.—COMMISSION TO EXAMINE WITNESS. — EVIDENCE.

Affidavit of, not receivable on motion for a new trial in criminal case.]

—*See* CRIMINAL LAW, 1.

